

Court File No.: T-347-22

FEDERAL COURT

B E T W E E N:

CANADIAN CONSTITUTION FOUNDATION

Applicant
(Moving Party)

and

ATTORNEY GENERAL OF CANADA

Respondent
(Responding Party)

and

ATTORNEY GENERAL OF ALBERTA

Intervenor
(On Application Only)

RESPONDING MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA

**Applicant's Motion regarding Rule 317 Record and s. 39 of the
*Canada Evidence Act***

May 25, 2022

ATTORNEY GENERAL OF CANADA

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FEDERAL COURT

BETWEEN:

CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF STEVEN SHRAGGE

Court File No.: T-316-22

FEDERAL COURT

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF STEVEN SHRAGGE

Court File No.: T-347-22

FEDERAL COURT

B E T W E E N:

CANADIAN CONSTITUTION FOUNDATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF STEVEN SHRAGGE

Court File No. T-382-22

FEDERAL COURT

B E T W E E N:

**JEREMIAH JOST, EDWARD CORNELL, VINCENT GIRCYS, and HAROLD
RISTAU**

Applicants

and

**GOVERNOR IN COUNCIL, HER MAJESTY IN RIGHT OF CANADA,
ATTORNEY GENERAL OF CANADA, and MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

AFFIDAVIT OF STEVEN SHRAGGE

I, Steven Shragge, of the City of Ottawa in the Province of Ontario, AFFIRM THAT:

1. I am a Senior Policy Advisor with the Privy Council Office, Security and Intelligence Secretariat. I have held this role since June 2021. My duties include monitoring and coordinating operational and policy issues related to national security in consultation with security departments and agencies, providing advice and support to the National Security and Intelligence Advisor to the Prime Minister, and supporting the Cabinet Process for files within my purview. I have worked in various government departments over the last 20 years and have been employed at the Privy Council Office (PCO) since October 2020 in national security-related functions.
2. I have operational knowledge of the mandates, memberships, and practices of decision-making and coordination structures. I do not have direct knowledge of Cabinet, council and ministerial deliberation and decision-making discussions during the days directly preceding the declaration of a public order emergency on February 14, 2022.
3. I have personal knowledge of all matters hereinafter deposed to, except where I have stated that my knowledge is on information and belief, in which case I have identified the source of my information and believe it to be true.
4. A report to the Houses of Parliament entitled "February 14, 2022 Declaration of Public Order Emergency Explanation pursuant to subsection 58(1) of the *Emergencies Act*" ("the Section 58 Explanation") was prepared by the Government and tabled in the House of Commons on February 16, 2022 and in the Senate on February 21, 2022. As stated in the *Emergencies Act* (the Act), the s. 58 Explanation contains an explanation of the reasons for issuing the declaration. At the same time and pursuant to the Act, the Report to the Houses of Parliament: *Emergencies Act* Consultations was also tabled in the House of Commons and in the Senate. Attached hereto and marked as **Exhibit "A"** is a copy of the Section 58 Explanation. Attached hereto and marked as **Exhibit "B"** is a copy of the Report to the Houses of Parliament: *Emergencies Act* Consultations, dated February 16, 2022.

5. The Section 58 Explanation states that the decision to issue the declaration was informed by robust discussions at three meetings of the Incident Response Group (IRG) on February 10, 12 and 13, 2022. The IRG serves as a dedicated emergency committee to advise the Prime Minister in the event of a national crisis or during incidents elsewhere that have major implications for Canada. The IRG is a coordination body responsible for promoting a prompt federal response to an incident to keep Canadians safe and secure, at home and abroad. The IRG is intended to provide advice to the Prime Minister, as well as help support coordination and information exchange amongst Ministers and drive forward a whole-of-government response to incidents.

6. The IRG is a working group of ministers. Membership can vary based on the nature of the incident and include both Ministers and other officials as required. Incidents are diverse and can include natural disasters, global security events, and the illegal blockades.

7. On February 10, 2022, Prime Minister Justin Trudeau convened the IRG on the ongoing illegal blockades taking place across the country. Prime Minister Trudeau was joined by ministers and senior officials who were actively engaged and working closely with provincial and municipal governments, and who were assessing the requirements and deploying all federal resources necessary to help them get the situation under control.

8. The IRG subsequently met on February 12 and 13, 2022, leading up to the Proclamation Declaring a Public Order Emergency. Those meetings also included Prime Minister Trudeau, Ministers and senior officials.

9. In addition, I am aware that Cabinet met on February 13, 2022.

10. On February 14, 2022, the Governor in Council declared a public order emergency under the *Emergencies Act* in respect of the illegal blockades occurring nationally.

11. Cabinet met again on February 15, 2022 at a regular meeting of Cabinet.

12. The *Emergency Measures Regulations*, SOR/2022-0021, and the *Emergency Economic Measures Order*, SOR/2022-22, were enacted on February 15, 2022.

13. On February 16, 2022, the Honourable Marco Mendicino brought a motion that, pursuant to section 58 of the Act, the House of Commons confirm the declaration of a public order emergency proclaimed on February 14, 2022. The motion was presented together with the Section 58 Explanation and the Report to the Houses of Parliament: *Emergencies Act* Consultations. Attached hereto and marked as **Exhibit "C"** is a copy of the Motion dated February 16, 2022.

14. On February 21, 2022, the motion passed with 185 votes in favour and 151 votes against. Attached hereto and marked as **Exhibit "D"** is a copy of the House of Commons Journals dated February 21, 2022.

15. On February 23, 2022, the declaration of a public order emergency under the *Emergencies Act* was revoked.

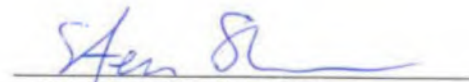
16. I make this affidavit in response to the applications for judicial review in court file numbers T-306-22, T-347-22, T-316-22, and T-382-22 and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of)
Ottawa, in the Province of Ontario)
this 4th day of April, 2022)



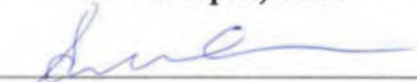
Commissioner for Taking Affidavit

LSO: 639974



STEVEN SHRAGGE

This is **Exhibit "A"** referred to
in the affidavit of
Steven Shragge
Affirmed before me this 4th day
of **April, 2022**.



A Commissioner for taking affidavits

L60 63497W

February 14, 2022 Declaration of Public Order Emergency

Explanation pursuant to subsection 58(1) of the *Emergencies Act*

Declaration of Public Order Emergency

On February 14, 2022, the Governor in Council directed that a proclamation be issued pursuant to subsection 17(1) of the *Emergencies Act* declaring that a public order emergency exists throughout Canada that necessitates the taking of special temporary measures for dealing with the emergency.

In order to declare a public order emergency, the *Emergencies Act* requires that there be an emergency that arises from threats to the security of Canada that are so serious as to be a national emergency. Threats to the security of Canada include the threat or use of acts of serious violence against persons or property for the purpose of achieving a political or ideological objective. A national emergency is an urgent, temporary and critical situation that seriously endangers the health and safety of Canadians that cannot be effectively dealt with by the provinces or territories, or that seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada. It must be a situation that cannot be effectively dealt with by any other law of Canada. Any measures taken under the *Act* must be exercised in accordance with the *Canadian Charter of Rights and Freedoms* and should be carefully tailored to limit any impact on *Charter* rights to what is reasonable and proportionate in the circumstances.

The *Proclamation Declaring a Public Order Emergency* made on February 14, 2022 specified that the public order emergency is constituted of:

- (i) the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,
- (ii) the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,
- (iii) the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the United States (U.S.), that are detrimental to the interests of Canada,

(iv) the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and

(v) the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians.

The proclamation specifies six types of temporary measures that may be necessary to deal with the public order emergency:

(i) measures to regulate or prohibit any public assembly — other than lawful advocacy, protest or dissent — that may reasonably be expected to lead to a breach of the peace, or the travel to, from or within any specified area, to regulate or prohibit the use of specified property, including goods to be used with respect to a blockade, and to designate and secure protected places, including critical infrastructure,

(ii) measures to authorize or direct any person to render essential services of a type that the person is competent to provide, including services related to removal, towing and storage of any vehicle, equipment, structure or other object that is part of a blockade anywhere in Canada, to relieve the impacts of the blockades on Canada's public and economic safety, including measures to identify those essential services and the persons competent to render them and to provide reasonable compensation in respect of services so rendered,

(iii) measures to authorize or direct any person to render essential services to relieve the impacts of the blockade, including measures to regulate or prohibit the use of property to fund or support the blockade, to require any crowdfunding platform and payment processor to report certain transactions to the Financial Transactions and Reports Analysis Centre of Canada and to require any financial service provider to determine whether they have in their possession or control property that belongs to a person who participates in the blockade,

(iv) measures to authorize the Royal Canadian Mounted Police (RCMP) to enforce municipal and provincial laws by means of incorporation by reference,

(v) the imposition of fines or imprisonment for contravention of any order or regulation made under section 19 of the *Emergencies Act*; and

(vi) other temporary measures authorized under section 19 of the *Emergencies Act* that are not yet known.

These measures have been implemented by the *Emergency Measures Regulations* and the *Emergency Economic Measures Order*.

Section 58(1) of the *Emergencies Act* requires that a motion for confirmation of a declaration of emergency, signed by a Minister of the Crown, together with an explanation of the reasons for

issuing the declaration and a report on any consultation with the lieutenant governors in council of the provinces with respect to the declaration, be laid before each House of Parliament within seven sitting days after the declaration is issued.

Background leading to the declaration of emergency

The “Freedom Convoy 2022” was the first manifestation of this growing movement centered on anti-government sentiments related to the public health response to the COVID-19 pandemic. Trucker convoys began their journey from various points in the country, and the movement arrived in Ottawa on Friday, January 28, 2022. Since then, the movement has only continued to gain momentum across the country, with significant increase in numbers in Ottawa as well as protests and blockades spreading in different locations, including strategic ports of entry (e.g., Ambassador Bridge, Ontario; Coutts, Alberta; and Emerson, Manitoba).

Participants of these activities have adopted a number of tactics that are threatening, causing fear, disrupting the peace, impacting the Canadian economy, and feeding a general sense of public unrest – either in favour or against the movement. This has included harassing and berating citizens and members of the media, slow roll activity, slowing down traffic and creating traffic jams, in particular near ports of entry, as well as reports of protesters bringing children to protest sites to limit the level and types of law enforcement intervention. The movement has moved beyond a peaceful protest, and there is significant evidence of illegal activity underway. Regular citizens, municipalities and the province of Ontario have all participated in court proceedings seeking injunctive relief to manage the threats and impacts caused by the convoy’s activities, and a proposed class-action has been filed on behalf of residents of Ottawa.

Anecdotal reports of donations from outside Canada to support the protesters were given credence when, on February 13, 2022, hackers of the crowdfunding website, GiveSendGo.com, released hacked data that revealed information about donors and the amount of donations directed to the protesters. According to the Canadian Broadcasting Corporation’s February 14, 2022 analysis of the data, 55.7% of the 92,844 donations made public were made by donors in the U.S., compared to 39% of donors located in Canada. The remaining donors were in other countries, with the U.K. being the most common. The amount donated by U.S. donors totaled \$3.6 million (USD). Many of the donations were made anonymously.

Requests for Assistance and Consultations

The federal government has been in contact with its provincial counterparts throughout this situation. Some requests for federal support to deal with the blockades were from:

- the City of Ottawa for policing services;
- the Province of Ontario with respect to the Ambassador Bridge in Windsor, Ontario; and

- the Province of Alberta with respect to tow truck capacity at the Coutts port of entry.

For further details on the consultations, please see the Report to the Houses of Parliament: *Emergencies Act Consultations*.

Emergency Measures Taken by Ontario and other provinces

On February 11, 2022, the Province of Ontario declared a province-wide state of emergency under its *Emergency Management and Civil Protection Act*, in response to the interference with transportation and other critical infrastructure throughout the province, which is preventing the movement of people and delivery of essential goods.

Measures that have since been implemented under these emergency measures include: fines and possible imprisonment for protesters refusing to leave, with penalties of \$100,000 and up to one year of imprisonment for non-compliance.

On February 12, 2022, the Ontario Government also enacted legislation under the *Emergency Management and Civil Protection Act*, (Ontario Regulation 71/22) making it illegal and punishable to block and impede the movement of goods, people and services along critical infrastructure. New Brunswick has announced that it will update its *Emergency Act* to prohibit stopping or parking a vehicle or otherwise contributing to the interruption of the normal flow of vehicle traffic on any road or highway. Nova Scotia similarly issued a directive under its *Emergency Management Act* prohibiting protests from blockading a highway near the Nova Scotia-New Brunswick border.

No other province has signaled its intent to take similar steps.

As detailed in the Reasons below, the convoy activities have led to an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency.

Reasons for Public Order Emergency

The situation across the country remains concerning, volatile and unpredictable. The decision to issue the declaration was informed by an assessment of the overall, national situation and robust discussions at three meetings of the Incident Response Group on February 10, 12 and 13, 2022.

The intent of these measures is to supplement provincial and territorial authorities to address the blockades and occupation and to restore public order, the rule of law and confidence in Canada's institutions. These time-limited measures will be used only where needed depending on the nature of the threat and its evolution and would not displace or replace provincial and territorial authorities, nor would they derogate provinces and territories' authority to direct their police

forces. The convoy activities and their impact constituting the reasons for the emergency as set out in the *Proclamation Declaring a Public Order Emergency* are detailed below:

- i. **the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada;**

The protests have become a rallying point for anti-government and anti-authority, anti-vaccination, conspiracy theory and white supremacist groups throughout Canada and other Western countries. The protesters have varying ideological grievances, with demands ranging from an end to all public health restrictions to the overthrow of the elected government. As one example, protest organizers have suggested forming a coalition government with opposition parties and the involvement of Governor General Mary Simon. This suggestion appears to be an evolution of a previous proposal from a widely circulated “memorandum of understanding” from a group called “Canada Unity” that is taking part in the convoy. The “memorandum of understanding” proposed that the Senate and Governor General could agree to join them in forming a committee to order the revocation of COVID-19 restrictions and vaccine mandates.

Tactics adopted by protesters in support of these aims include slow roll activity, slowing down traffic and creating traffic jams, in particular near ports of entry, as well as reports of protesters bringing children to protest sites to limit the level and types of law enforcement intervention. The intent of the protestors at ports of entry was to impede the importation and exportation of goods across the Canada-U.S. border in order to achieve a change in the Government of Canada’s COVID health measures in addition to other government policies.

Trucks and personal vehicles in the National Capital Region continue to disrupt daily life in Ottawa and have caused retail and other businesses to shutter. Local tow truck drivers have refused to work with governments to remove trucks in the blockade. The Chief of the Ottawa Police Service resigned on February 15, 2022 in response to criticism of the police’s response to the protests.

Convoy supporters formerly employed in law enforcement and the military have appeared alongside organizers and may be providing them with logistical and security advice, which may pose operational challenges for law enforcement should policing techniques and tactics be revealed to convoy participants. There is evidence of coordination between the various convoys and blockades.

Violent incidents and threats of violence and arrests related to the protests have been reported across Canada. The RCMP's recent seizure of a cache of firearms with a large quantity of ammunition in Coutts, Alberta, indicated that there are elements within the protests that have intentions to engage in violence. Ideologically motivated violent extremism adherents may feel empowered by the level of disorder resulting from the protests. Violent online rhetoric, increased threats against public officials and the physical presence of ideological extremists at protests also indicate that there is a risk of serious violence and the potential for lone actor attackers to conduct terrorism attacks.

To help manage these blockades and their significant adverse impacts, the *Emergency Measures Regulations* prohibit certain types of public assemblies ("prohibited assemblies") that may reasonably be expected to lead to a breach of the peace by: (i) the serious disruption of the movement of persons or goods or the serious interference with trade; (ii) interference with the functioning of critical infrastructure; or (iii) the support the threat or use of acts of serious violence against persons or property. They also prohibit individuals from (i) participating or causing minors to participate in prohibited assemblies; (ii) travelling to or within an area where prohibited assemblies are taking place, or causing minors to travel to or within 500 metres of a prohibited assembly, subject to certain exceptions; and (iii) directly or indirectly using, collecting, providing, making available or soliciting property to facilitate or participate in a prohibited assembly or to benefit any person who is facilitating or participating in a prohibited assembly. Foreign nationals are also prohibited from entering Canada with the intent to participate or facilitate a prohibited public assembly, subject to certain exceptions.

The *Emergency Management Regulations* also designate certain places as protected and provide that they may be secured, including Parliament Hill and the parliamentary precinct, critical infrastructures, official residences, government and defence buildings, and war memorials.

- ii. **the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings**

Trade and transportation within Canada and between Canada and the U.S. is highly integrated. Border crossing, railway lines, airports and ports of entry are integrated and are adversely affected where one or more of the components is blockaded or prevented from operating under normal capacity.

Trade between Canada and the U.S. is crucial to the economy and the lives and welfare of all Canadians. Approximately 75% of Canadian exports go to the U.S., generating approximately \$2 billion in imports/exports per day and \$774 billion in total trade between the two countries in 2021.

Blockades and protests at numerous points along the Canada–U.S. border have already had a severe impact on Canada’s economy. Protests at the major ports of entry at the Ambassador Bridge in Windsor, Ontario; Emerson, Manitoba; Coutts Alberta; and, Pacific Highway in British Columbia, each of which is critical to the international movement of people and goods, required the Canada Border Services Agency (CBSA) to suspend services.

An essential trading corridor, the Ambassador Bridge is Canada’s busiest crossing, handling over \$140 billion in merchandise trade in 2021. It accounted for 26% of the country’s exports moved by road in 2021 (\$63 billion out of \$242 billion) and 33% of the country’s imports (\$80 billion out of \$240 billion). Since the blockades began at the Ambassador Bridge, over \$390 million in trade each day with Canada’s most important trading partner, the U.S., has been affected, resulting in the loss of employee wages, reduced automotive processing capacity and overall production loss in an industry already hampered by the supply shortage of critical electronic components. This bridge supports 30% of all trade by road between Canada and the U.S. The blockades in Coutts, Alberta, and Emerson, Manitoba, have affected approximately \$48 million and \$73 million in trade each day, respectively. These recent events targeting Canada’s high volume commercial ports of entry have irreparably harmed the confidence that our trading partners have in Canada’s ability to effectively contribute to the global economy and will result in manufacturers reassessing their manufacturing investments in Canada, impacting the health and welfare of thousands of Canadians.

In addition, throughout the week leading up to February 14, 2022, there were 12 additional protests that directly impacted port of entry operations. At two locations, Pacific Highway and Fort Erie, protestors had breached the confines of the CBSA plaza resulting in CBSA officers locking down the office to prevent additional protestors from gaining entry.

More specifically, disruptions at strategic ports of entry in Alberta, British Columbia, Manitoba and Ontario prior to the declaration of the emergency included:

- Ambassador Bridge, Windsor, Ontario: The busiest crossing along the Canada-U.S. border had been blocked since February 7, 2022. After an injunction was issued on February 11, 2022, law enforcement started to disperse protesters. On February 13, 2022, police enforcement action continued with reports of arrests being made and vehicles towed. As of the evening of February 13, 2022, the Ambassador Bridge has been fully reopened, and no delays at the border crossing are being reported, but efforts continue to ensure that the bridge remains open.

- Sarnia, Ontario: On February 8, 2022, two large groups of protestors conducted a blockade of the provincial highway leading to and from the Sarnia Blue Water Bridge. This port of entry is Canada's second busiest border crossing with imports and exports serving the oil and gas, perishable foods, livestock and automotive sectors. The protest resulted in the suspension of all outbound movement of commercial and traveller vehicles to the U.S. along with reduced inbound capacity for incoming conveyances. The Ontario Provincial Police (OPP) were able to restore order to the immediate area of the port of entry after ten hours of border disruption. On February 9, 2022, members of one of the protest groups established a highway blockade approximately 30 kilometres east of Sarnia on the provincial highway, resulting in the diversion of international traffic to emergency detour routes to gain access to the border. This activity continued until February 14, 2022 when access to the portion of the highway was restored.
- Fort Erie, Ontario: On February 12, 2022, a large protest targeted the CBSA Peace Bridge port of entry at Fort Erie, Ontario. This port of entry is Canada's third busiest land border crossing responsible for millions of dollars in international trade each day of perishable goods, manufacturing components and courier shipments of personal and business goods being imported and exported. The protest disrupted inbound traffic for a portion of the day on February 12, 2022 and resulted in the blockade of outbound traffic until February 14, 2022 when the OPP and Niagara Regional Police were able to restore security of the trade corridor linking the provincial highway to the border crossing.
- Emerson, Manitoba: As of February 13, 2022, vehicles of the blockade remain north of the port of entry. Some local traveller traffic was able to enter Canada, however commercial shipments are unable to use the highway North of Emerson resulting in disruptions to live animal, perishable and manufactured goods shipments into Canada and exports to the U.S. The protesters have allowed some live animal shipments to proceed through the blockade for export to the U.S.
- Coutts, Alberta: The blockade began on January 29, 2022, resulting in the disruption of Canada and U.S. border traffic. This port of entry is a critical commercial border point for the movement of live animals, oil and gas, perishable and manufactured goods destined for Alberta and western Saskatchewan. As of February 14, 2022, the RCMP, who is the police of jurisdiction pursuant to the provincial Police Service Agreement, have arrested 11 individuals and seized a cache of weapons and ammunition. Four of these individuals were charged with conspiracy to commit murder, in addition to other offences. The RCMP restored access to the provincial highway North of Coutts on February 15, 2022 and border services were fully restored, but efforts continue to ensure that it remains open.

- Vancouver, British Columbia (BC), and Metro area: On February 12, 2022, several vehicles including a military-style vehicle broke through an RCMP barricade in south Surrey, BC, on their way to the Pacific Highway port of entry. Protesters forced the highway closure at the Canada-U.S. border in Surrey.

In addition, on February 12, 2022, police in Cornwall, Ontario warned of potential border delays and blockages due to protests.

These blockades and protests directly threaten the security of Canada's borders, with the potential to endanger the ability of Canada to manage the flow of goods and people across the border and the safety of CBSA officers and to undermine the trust and coordination between CBSA officials and their American partners. Additional blockades are anticipated. While Ontario's *Emergency Management and Civil Protection Act* authorizes persons to provide assistance, it specifically does not compel them to do so. Tow truck operators remain free to decline requests to tow vehicles that were part of the blockades and they have refused to render assistance to the government of Ontario. It was beyond the capacity of the province of Ontario to ensure in a timely manner that tow trucks could be used to clear vehicles. The emergency measures now allow the federal Minister of Public Safety and Emergency Preparedness or any other person acting on their behalf to immediately compel individuals to provide and render essential goods and services for the removal, towing or storage of any vehicle or other object that is part of a blockade and provides that reasonable compensation will be payable. Individuals who suffer loss or damage because of actions taken under these Regulations may apply for compensation.

Threats were also made to block railway lines, which would result in significant disruptions. Canada's freight rail industry transports more than \$310 billion worth of goods each year on a network that runs from coast to coast. Canada's freight railways serve customers in almost every part of the Canadian economy: from manufacturing to the agricultural, natural resource, wholesale and retail sectors. In addition, freight railways have Canadian operating revenues of more than \$16 billion a year.

The impact on important trade corridors and the risk to the reputation of Canada as a stable, predictable and reliable location for investment may be jeopardized if disruptions continue. The current federal and provincial financial systems are ill-equipped to mitigate the adverse effects of the economic impact without additional measures. The *Emergency Economic Measures Order* requires a comprehensive list of financial service providers to determine whether any of the property in their possession or control belong to protesters participating in the illegal blockades and to cease dealing with those protesters. Financial service providers who would otherwise be outside federal jurisdiction are subject to the Order. Given the ability to move financial resources between financial service providers without regard to their geographic location or whether they are provincially- or federally-regulated, it is essential that all financial service providers be subject to the Order if protesters are to be prevented from accessing financial services. The importance of

this measure is highlighted by the Canadian Broadcasting Corporation's recent reporting about the crowdfunding website, GiveSendGo.com, which indicated that the majority of the donations to the protests were made by donors outside of Canada.

Before the new measures, in respect of insurance, provinces would only be able to cancel or suspend policies for vehicles registered in that province. Protestors from different provinces would not be subject to, for example, the Government of Ontario's powers under its declaration of a state of emergency to cancel licenses of vehicles participating in blockades or prohibited assemblies. The emergency measures now require insurance companies to cancel or suspend the insurance of any vehicle or person while that person or vehicle is taking part in a prohibited assembly as defined under the new *Emergency Measures Regulations*.

iii. the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the U.S., that are detrimental to the interests of Canada

The U.S. has expressed concerns related to the economic impacts of blockades at the borders, as well as possible impacts on violent extremist movements. During a call with President Joe Biden on February 11, 2022, the critical importance of resolving access to the Ambassador Bridge and other ports of entry as quickly as possible was discussed, given their role as vital bilateral trade corridors, and as essential to the extensive interconnections between our two countries.

Disruptions at ports of entry have significant impacts on trade with U.S. partners and the already fragile supply chain, and have resulted in temporary closures of manufacturing sites, job loss, and loss of revenues. One week of the Ambassador Bridge blockade alone is estimated to have caused a total economic loss of \$51 million for U.S. working people and businesses in the automotive and transportation industry. Consequently, the protests have been the cause of significant criticism and concern from U.S. political, industry and labour leaders.

The Governor of Michigan has issued several statements expressing her frustration with the ongoing protests and blockade and the damage they are doing to her state and constituents. Similar frustrations have been voiced by the General President of the International Brotherhood of Teamsters and the Canada-U.S. Business Association. The blockades and protests are of such concern to the U.S. government that the Department of Homeland Security Secretary has offered its assistance in ending the protests.

More generally, the protests and blockades are eroding confidence in Canada as a place to invest and do business. Politicians in Michigan have already speculated that disruptions in cross border trade may lead them to seek domestic, as opposed to Canadian, suppliers for automotive parts.

iv. the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number

Canada has a uniquely vulnerable trade and transportation system. Relative to global competitors, Canadian products travel significantly further, through challenging geography and climate conditions. Moreover, trade and transport within Canada, and between Canada and the U.S. is highly integrated.

The closure of, and threats against, crucial ports of entry along the Canada-U.S. border has not only had an adverse impact on Canada's economy, it has also imperiled the welfare of Canadians by disrupting the transport of crucial goods, medical supplies, food, and fuel across the U.S.-Canada border. A failure to keep international crossings open could result in a shortage of crucial medicine, food and fuel.

In addition to the blockades along the border, protesters attempted to impede access to the MacDonald-Cartier International Airport in Ottawa and threatened to blockade railway lines. The result of a railway blockade would be significant. As noted above, Canada's freight rail industry transports more than \$310 billion worth of goods each year on a network that runs from coast to coast. Canada's freight railways serve customers in almost every part of the Canadian economy: from manufacturing, to the agricultural, natural resource, wholesale and retail sectors.

v. the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians

The protests and blockades pose severe risks to public safety. While municipal and provincial authorities have taken decisive action in key affected areas, such as law enforcement activity at the Ambassador Bridge in Windsor, considerable effort was necessary to restore access to the site and will be required to maintain access.

There is significant evidence of illegal activity to date and the situation across the country remains concerning, volatile and unpredictable. The Freedom Convoy could also lead to an increase in the number of individuals who support ideologically motivated violent extremism (IMVE) and the prospect for serious violence. Proponents of IMVE are driven by a range of influences rather than a singular belief system. IMVE radicalization is more often caused by a combination of ideas and grievances resulting in a personalized worldview. The resulting worldview often centres on the willingness to incite, enable or mobilize violence.

On February 14, 2022, the RCMP arrested numerous individuals in Coutts, Alberta associated with a known IMVE group who had been engaged with the protests and seized a cache of firearms with a large quantity of ammunition, which indicates that there are elements within this movement that intend to engage in violence. Four of these individuals were charged with conspiracy to commit murder, in addition to other offences.

Since the convoy began, there has been a significant increase in the number and duration of incidents involving criminality associated with public order events related to anti-public health measures and there have been serious threats of violence assessed to be politically or ideologically motivated. Two bomb threats were made to Vancouver hospitals and numerous suspicious packages containing rhetoric that references the hanging of politicians and potentially noxious substances were sent to offices of Members of Parliament in Nova Scotia. While a link to the convoy has not yet been established in either case, these threats are consistent with an overall uptick in threats made against public officials and health care workers. A number of threats were noted regarding the Nova Scotia-New Brunswick border demonstration set for February 12, 2022, including a call to bring “arms” to respond to police if necessary. An Ottawa tow truck operator reported that he received death threats from protest supporters who mistakenly believed he provided assistance to the police.

The Sûreté du Québec (SQ) has been dealing with multiple threats arising from the protests. In early February, 2022, the SQ was called in to provide protection to the National Assembly in response to the convoy protests in Quebec City. Some individuals associated with the protests had threatened to take up arms and attack the National Assembly. This led to all parties at the National Assembly strongly denouncing all threats of violence. While that protest was not accompanied by violence, the threat has not ended; the protesters have stated that they plan to return on February 19, 2022. At the same time, the SQ is also dealing with threats of protests and blockades along Quebec’s border with New York State. This requires the SQ to deploy resources to establish checkpoints and ensure that crucial ports of entry remain open.

Other incidents which have occurred during the course of the blockades point to efforts by U.S.-based supporters of IMVE to join protests in Canada, or to conduct sympathetic disruptive blockades on the U.S. side of ports of entry. In some cases, individuals were openly carrying weapons. U.S.-based individuals, some openly espousing violent extremist rhetoric, have employed a variety of social media and other methods to express support for the ongoing blockades, to advocate for further disruptions, and to make threats of serious violence against Canadian law enforcement and the Government of Canada.

Several individuals with U.S. status have attempted to enter Canada with the stated purpose of joining the blockades. One high profile individual is known to have openly expressed opposition to COVID-19-related health measures, including vaccine mandates and has attempted to import

materials to Canada for the express purpose of supporting individuals participating in the blockades.

As of February 14, 2022, approximately 500 vehicles, most of them commercial trucks, were parked in Ottawa's downtown core. There have been reports of protesters engaging in hate crimes, breaking into businesses and residences, and threatening law enforcement and Ottawa residents.

Protesters have refused to comply with injunctions covering downtown Ottawa and the Ambassador Bridge and recent legislation enacted by the Ontario Government under the *Emergency Management and Civil Protection Act* (Ontario Regulation 71/22), which makes it illegal and punishable to block and impede the movement of goods, people and services along critical infrastructure. In Ottawa, the Ottawa Police Service has been unable to enforce the rule of law in the downtown core due to the overwhelming volume of protesters and the Police's ability to respond to other emergencies has been hampered by the flooding of Ottawa's 911 hotline, including by individuals from outside Canada. The occupation of the downtown core has also hindered the ability of emergency medical responders to attend medical emergencies in a timely way and has led to the cancellation of many medical appointments.

The inability of municipal and provincial authorities to enforce the law or control the protests may lead to a further reduction in public confidence in police and other Canadian institutions.

The situation in downtown Ottawa also impedes the proper functioning of the federal government and the ability of federal government officials and other workers to enter their workplaces in the downtown core safely.

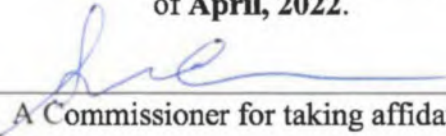
Furthermore, the protests jeopardize Canada's ability to fulfil its obligations under the *Vienna Convention on Diplomatic Relations* as a host of the diplomatic community and pose risks to foreign embassies, their staff and their access to their diplomatic premises.

Conclusion

The ongoing Freedom Convoy 2022 has created a critical, urgent, temporary situation that is national in scope and cannot effectively be dealt with under any other law of Canada. The blockades of the ports of entry have disrupted the transportation of crucial medicine, goods, fuel and food to Canadians and are causing significant adverse effects on Canada's economy, relationship with trading partners and supply chains. These trade disruptions, the increase in criminal activity, the occupation of downtown Ottawa and the threats of violence and presence of firearms at protests – along with the other reasons detailed above – constitute a public order emergency, an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency. The types of measures set out in the February 14, 2022 *Proclamation Declaring a Public Order Emergency* are necessary in order to supplement

provincial and territorial authorities to address the blockades and occupation and to restore public order, the rule of law and confidence in Canada's institutions. The measures have been carefully tailored such that any potential effects on rights protected under the *Canadian Charter of Rights and Freedoms* are reasonable and proportionate in the circumstances.

This is **Exhibit "B"** referred to
in the affidavit of
Steven Shragge
Affirmed before me this 4th day
of **April, 2022**.



A Commissioner for taking affidavits

CB: 63497W

Minister of Public Safety



Ministre de la Sécurité publique

Report to the Houses of Parliament: *Emergencies Act* Consultations

February 16, 2022

Report to the Houses of Parliament: *Emergencies Act* Consultations

Background and the Requirement to Consult

On February 14, 2022, the Governor in Council declared a public order emergency under the *Emergencies Act*. Section 25 of the Act requires the Governor in Council to consult the Lieutenant Governor in Council of each province with respect to a proposal to declare a public order emergency. A report of these consultations must be laid before each House of Parliament within seven sitting days after the declaration is issued, in accordance with section 58 of the Act.

Engagement

Since the crisis began in late January, federal ministers and officials have continuously engaged provinces and territories, municipalities, and law enforcement agencies to assess the situation and to offer the support and assistance of the Government of Canada. Staff in the Prime Minister's Office and in various Minister's offices had ongoing communications with Premiers' offices and related ministers' offices throughout this period. Examples of engagement with provincial, municipal, and international partners include the following:

- There has been regular engagement with the City of Ottawa in relation to requests for federal support. This includes the request from the City of Ottawa for policing services (February 7, 2022 letter to the Prime Minister from the Ottawa Mayor and the Chair of the Ottawa Police Services Board).
 - The Prime Minister spoke to the Mayor of Ottawa on January 31 and February 8, 2022 about the illegal occupation in Ottawa.
 - Trilateral meetings took place on February 7, 8, and 10, 2022 with the President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness, the Minister of Public Safety, the Mayor of Ottawa, the City Manager of Ottawa, and the Chief of Ottawa Police Services. The Minister also spoke with the Solicitor General of Ontario on February 7, 2022 to discuss the work of the tripartite table.
 - Staff from the Office of the President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness have been in regular contact with the Office of the Premier of Ontario, as well as the Deputy Mayor of Ottawa.
 - The President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness also spoke with the President of the Canadian Association of Chiefs of Police on February 3 and 13, 2022 on support for the Ottawa Police Service.

- The President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness also spoke with the President of the Federation of Canadian Municipalities on February 3, 2022 about the situation in Ottawa.
- There has also been regular engagement with municipal and provincial officials concerning the Ambassador Bridge, including on a request for assistance received from the City of Windsor on February 9, 2022.
 - The Prime Minister spoke with the Premier of Ontario on February 9, 2022, and the Minister of Intergovernmental Affairs, Infrastructure and Communities spoke with the Premier of Ontario (February 10 and 11, 2022) regarding measures being taken by the Province in relation to the Ambassador Bridge.
 - The Prime Minister spoke to the Mayor of Windsor on February 10, 2022 about the blockade at the Ambassador Bridge.
 - The Prime Minister spoke with the President of the United States on February 11, 2022. The leaders discussed the critical importance of resolving access to the Ambassador Bridge and other ports of entry as quickly as possible.
 - The Minister of Transport spoke with Ontario's Minister of Transportation on February 9, 2022 about the blockades at border crossings. The Minister also spoke with the Mayor of Windsor on February 11, 2022 concerning the Ambassador Bridge.
 - Staff from the Office of the President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness and the Office of the Minister of Intergovernmental Affairs, Infrastructure and Communities have also been in regular contact with the City of Windsor.
- The Minister of Public Safety engaged the Premier of Ontario on February 9, 2022. The Minister has also been in regular contact with the Mayor of Ottawa and the Mayor of Windsor, including through the tripartite discussions. His staff have also engaged with both Mayors' offices. The Office of the Minister of Intergovernmental Affairs, Infrastructure and Communities engaged the Office of the Minister of Transportation of Ontario on February 7, 2022, and was in regular contact with the Office of the Premier of Ontario.
- The Office of the Prime Minister has also had ongoing discussions with the Office of the Premier of Ontario regarding the Ottawa, Windsor, and Sarnia blockades in the weeks leading up to the declaration. These conversations made it clear that more federal support was needed.

- There has been regular engagement with provincial officials concerning the Coutts port of entry, including the Province's request for assistance in relation to tow truck capacity (February 5, 2022 letter to Ministers of Public Safety and Emergency Preparedness from the Alberta Minister of Municipal Affairs).
 - The Minister of Public Safety engaged with the Premier of Alberta on February 2 and 9, 2022, and with the Premier and the Acting Minister of Justice and Solicitor General of Alberta on February 7, 2022. The Minister also engaged the Acting Minister of Justice and Solicitor General of Alberta on February 1, 5, and 9, 2022.
 - The Minister of Transport spoke with Alberta's Minister of Transportation on February 5 and 9, 2022.
 - The Minister of Intergovernmental Affairs, Infrastructure and Communities communicated with the Premier of Alberta on February 10 and 11, 2022.
- Ministers also engaged counterparts in other provinces:
 - The Minister of Transport spoke with Manitoba's Minister of Transportation and Infrastructure on February 12, 2022 concerning the Emerson port of entry.
 - The President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness spoke with the Minister of Public Safety and Solicitor General and Deputy Premier of British Columbia on February 5 and 13, 2022 to discuss protests in Victoria and how the federal government could assist if circumstances required, including mutual emergency legislation.
 - In support of his Cabinet colleagues and on behalf of the Prime Minister, the Minister of Intergovernmental Affairs, Infrastructure and Communities also communicated with the premiers of Nova Scotia (February 12, 2022), New Brunswick (February 12, 2022), Newfoundland and Labrador (February 12, 2022), and British Columbia (February 13, 2022) to ask about the current status and to offer federal support to help the provinces respond to the disruption and blockades.

Federal, provincial, and territorial (FPT) officials have also met on a multilateral and bilateral basis, including the following:

- Public Safety Canada officials shared information on the ongoing situation and the use of authorities. This included:

- The FPT Crime Prevention and Policing Committee (CPPC) held an ad hoc meeting on February 7, 2022 at the deputy minister level.
 - The FPT CPPC Committee met at the assistant deputy minister level on February 1 and 11, 2022.
 - Discussions took place with assistant deputy ministers from Ontario, Manitoba, and Alberta on February 13, 2022, and with Ontario and Manitoba on February 14, 2022.
- Transport Canada officials gathered and shared information with PT transport ministries on PT tools/actions being considered to manage the convoys, including potential infraction and enforcement regimes under the respective jurisdictions' motor vehicle safety legislation. This included:
 - The ADM-level table of the Council of Ministers Responsible for Transportation and Highway Safety met twice, on February 4 and 8, 2022.
 - Calls took place with Alberta and Ontario on February 5, 2022, with Ontario on February 6 and 7, 2022, and with Alberta on February 7, 2022.

The Government of Canada also engaged Indigenous leaders regarding the blockades. For example, the Minister of Crown-Indigenous Relations spoke with the National Chief of the Assembly of First Nations, the President of the Inuit Tapiriit Kanatami, the President of the Métis National Council, the Grand Chief of Akwesasne, and the Grand Chief of the Manitoba Southern Chief's Organization.

The decisions on next steps and to consult premiers on the *Emergencies Act* was informed by all of the federal ministerial and senior official engagement with provinces since the onset of the crisis.

Consultations on the Emergencies Act with First Ministers

The Prime Minister convened a First Ministers' Meeting on February 14, 2022, to consult premiers on whether to declare a public order emergency under the *Emergencies Act*. The Prime Minister was joined by the Minister of Intergovernmental Affairs, Infrastructure and Communities, the Minister of Justice and Attorney General of Canada, and the Minister of Public Safety. All premiers participated.

The Prime Minister explained why the declaration of a public order emergency might be necessary and formally consulted premiers. The Minister of Justice outlined potential measures the Government of Canada was contemplating to take under the *Emergencies Act* to supplement the measures in the provinces' jurisdiction and respond to the urgent and

unprecedented situation. The Prime Minister asked what measures could be supplemented through the *Emergencies Act* by using proportional, time-limited authorities.

Each premier was given the opportunity to provide his/her perspectives on the current situation – both nationally and in their own jurisdiction – and whether a declaration of public order emergency should be issued. A variety of views and perspectives were shared at the meeting. Some premiers indicated support for the proposed measures as necessary to resolve the current situation, noting they would be focused on targeted areas, time-limited, and would be subject to ongoing engagement. Other premiers did not feel the *Emergencies Act* was needed at this time, arguing that provincial and municipal governments have sufficient authority to address the situation in their respective jurisdictions. Some premiers expressed caution that invoking the *Emergencies Act* could escalate the situation.

While the views expressed at the First Ministers' Meeting were shared in confidence, premiers provided their perspectives in public statements following the First Ministers' Meeting.

- The Premier of Ontario said he supports the federal government's decision to provide additional tools to help police resolve the situation in the nation's capital. He said he expressed to the Prime Minister that these measures should be targeted and time-limited.
- The Premier of Newfoundland and Labrador said that he supports invoking the *Emergencies Act* on a time limited basis to bolster the response to deal with unacceptable behaviour within blockades, infringing on the rights of law-abiding Canadians.
- British Columbia's Minister of Public Safety and Solicitor General and Deputy Premier also said that the Province supported the use of the *Emergencies Act*, according to media reports.
- The Premier of Quebec said that he opposed the application of the *Emergencies Act* in Quebec, stating that municipal police and the Sûreté du Québec have control of the situation, and arguing that the use of the Act would be divisive.
- The Premier of Alberta tweeted that Alberta's Government is opposed to the invocation of the *Emergencies Act*, arguing that Alberta has all the legal tools and operational resources required to maintain order. He also expressed concern that invocation of the *Emergencies Act* could escalate a tense situation.
- The Premier of Saskatchewan issued the following tweet: "The illegal blockades must end, but police already have sufficient tools to enforce the law and clear the blockades, as they did over the weekend in Windsor. Therefore, Saskatchewan does not support the Trudeau government invoking the *Emergencies Act*. If the federal government does proceed with

this measure, I would hope it would only be invoked in provinces that request it, as the legislation allows.”

- The Premier of Manitoba issued a statement in which she noted that the situation in each province and territory is very different and she is not currently satisfied the *Emergencies Act* should be applied in Manitoba. She said that in her view, the sweeping effects and signals associated with the never-before-used *Emergencies Act* are not constructive in Manitoba, where caution must be taken against overreach and unintended negative consequences.
- The Premier of New Brunswick, the Premier of Nova Scotia, and the Premier of Prince Edward Island have also commented that they do not believe the *Emergencies Act* is necessary in their respective provinces, stating that policing services have sufficient authority to enforce the law.
- The premiers of Yukon, the Northwest Territories, and Nunavut provided feedback during the First Ministers' Meeting, although have not issued public statements.

During the First Ministers' Meeting, the Prime Minister emphasized that a final decision had not yet been made, and that the discussion amongst First Ministers would inform the Government of Canada's decision.

There was further engagement with provinces following the First Ministers' Meeting and prior to the Government of Canada's decision to declare a public order emergency on February 14, 2022:

- The Office of the Prime Minister spoke with the Office of the Premier of British Columbia, as Chair of the Council of the Federation, before the Government of Canada's decision was made on February 14, 2022 to offer briefings to premiers' offices, and to explain the role of provinces and territories under the *Emergencies Act*.
- The Minister of Intergovernmental Affairs, Infrastructure and Communities communicated with his Quebec counterpart on the *Emergencies Act*. The Minister of Canadian Heritage and Quebec Lieutenant also connected with Quebec's Deputy Premier and Minister of Public Safety and Quebec's Minister of Finance, and officials from the Prime Minister's Office engaged with the Office of the Premier of Quebec.
- The Minister of Intergovernmental Affairs, Infrastructure and Communities also engaged the Premier of Ontario and received feedback from the Premier of Saskatchewan.

- The Office of the Prime Minister spoke with the Office of the Premier of Ontario and the Office of the Premier of Newfoundland and Labrador on February 14, 2022 to explain the rationale and implementation of the *Emergencies Act*.

The Prime Minister considered all of the comments shared at the First Ministers' Meeting, as well as the many other sources of information and intelligence. He announced his intention to invoke the *Emergencies Act* with targeted, time-limited measures that would complement provincial and municipal authorities late in the day on February 14, 2022.

On February 15, 2022 the Prime Minister wrote to all premiers, outlining the reasons why the Government of Canada decided to declare a public order emergency and described the types of measures that would be available under the Act. The letter responded to issues raised during the discussion, particularly on whether the declaration of a public order emergency should apply nationally. For example, the letter emphasized that the measures would be applied to targeted areas; that measures would supplement, rather than replace, provincial and municipal authorities; that these are tools that could be employed by police of local jurisdiction, at their discretion; and that the Royal Canadian Mounted Police would be engaged only when requested by local authorities. The letter also emphasized the Government of Canada's strong interest in further engagement and collaboration with provinces and territories on these issues.

Next Steps

Consistent with the *Emergencies Act's* requirements, the Government of Canada is committed to ongoing consultation and collaboration with the provinces and territories to ensure that the federal response complements the efforts of their governments. Ongoing consultation will also be necessary should there be a need to modify or extend existing orders under the *Emergencies Act*.

Supported by their officials, Ministers engaged with their counterparts following the First Ministers' Meeting, and will continue to engage provinces and territories on an ongoing basis. They will be available to quickly respond to specific issues or situations, as they arise. More recent engagement includes:

- The Minister of Justice and Attorney General of Canada spoke with his Quebec counterpart on February 14, 2022 about the *Emergencies Act*.
- The Minister of Transport spoke with British Columbia's Minister of Transportation and Infrastructure on February 14, 2022 about blockades at border crossings. The Ministers discussed how the *Emergencies Act* can assist law enforcement.

- The Minister of Transport spoke with Nova Scotia's Minister of Public Works on February 15, 2022 and provided an overview of the emergency measures being taken under the *Emergencies Act*.
- On February 15, 2022, representatives from the Justice Minister's Office spoke with the Mayor of Winnipeg about the *Emergencies Act*. In a statement on February 15, 2022, the Mayor said he is grateful the federal government is "taking action to make additional tools available to assist with the quick and peaceful end to the unlawful occupations."
- A briefing for PT Deputy Ministers of Intergovernmental Affairs took place on February 15, 2022. A follow-up meeting is scheduled for February 17, 2022. FPT Deputy Ministers of Intergovernmental Affairs will continue to engage on these issues through regular and ongoing communications.
- A briefing is planned for February 16, 2022 for Assistant Deputy Ministers in provincial and territorial ministries of Public Safety, Transportation, the Solicitor General, and Intergovernmental Affairs.
- Collaboration through policing services will also continue. On February 15, 2022, the Interim Chief of the Ottawa Police Service stated that with new resources from policing partners and tools from both the provincial and federal governments, the Ottawa Police Service believe they now have the resources and power to bring a safe end to this occupation. Ottawa's Deputy Police Chief further commented that there is collaboration on the application of the *Emergencies Act* in Ottawa.
- There will be weekly engagement by the Minister of Public Safety with his provincial and territorial counterparts.

The Government of Canada will continue to gather and assess feedback through these ongoing engagements to assess the orders and regulations under the *Emergencies Act* and to ensure a coordinated and effective response on behalf of Canadians.

Annex:

- Letter from the Prime Minister to premiers

Annex: Letter from the Prime Minister to premiers

Dear Premier:

I would like to thank you for the productive conversation we had at the First Ministers' Meeting on February 14, 2022, where we consulted you on the declaration of a public order emergency under the *Emergencies Act*.

I recognize many Canadians, including myself, are frustrated with the pandemic, and with having our lives disrupted for two years. However, while some protestors have participated to demonstrate their fatigue and frustration with public health measures, this is no longer the motivation of many of the participants and organizers. We are seeing activity that is a threat to our democracy and that is undermining the public's trust in our institutions.

The Government of Canada believes firmly in the right to peaceful protest. But as we discussed, the activities taking place across the country have gone well beyond peaceful protest. These are organized events, and the situation is very volatile. While this may have started in Ottawa, we are seeing flare-ups in almost every jurisdiction.

We are facing significant economic disruptions, with the breakdown of supply chains. This is costing Canadians their jobs and undermining our economic and national security, with potentially significant impacts on the health and safety of Canadians. It is affecting Canada's reputation internationally, hurting trade and commerce, and undermining confidence and trust in our institutions.

Given that this situation is escalating, we each have to look at all possible measures to resolve the current challenges as quickly as possible. We believe that we have reached the point where there is a national emergency arising from threats to Canada's security. That is why the Government of Canada has determined it is necessary to take action to protect Canadians and safeguard our economy by declaring a public order emergency under the *Emergencies Act*.

The declaration of a public order emergency serves as authority for Canada to enact measures under paragraph 19(1) of the *Emergencies Act*. During our

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call, Minister Lametti highlighted six types of temporary, time-limited measures that could be adopted under the *Emergencies Act*:

1. Regulation and prohibition of public assemblies that lead to a breach of the peace other than lawful advocacy, protest, or dissent

What we are seeing in Ottawa and at the Ambassador Bridge are not lawful protests. Examples of measures could include: prohibiting minors from participating in an unlawful activity; prohibiting foreign nationals from entering Canada to participate in an illegal gathering; removing foreign nationals from Canada when appropriate; and adding to the list of offences that qualify as inadmissible criteria for entry into Canada.

2. Designating and securing places where blockades are to be prohibited

This could include geographically limited application at borders, approaches to borders, other critical infrastructure, or the City of Ottawa.

3. Directing persons to render essential services to relieve impacts of blockades on Canada's economy

This could include tow trucks and their drivers, for compensation.

4. Authorizing or directing financial institutions to render essential services to relieve impact of blockades

This could include regulating and prohibiting the use of property to fund or support the blockades.

5. Measures enabling the RCMP to enforce municipal by laws and provincial offences where required, and if asked by local authorities

All measures enacted pursuant to the *Emergencies Act* would be enforceable by municipal and provincial police services; the RCMP can contribute if asked to do so.

6. The imposition of fines or imprisonment for contravention of any order or regulation made under section 19 of the *Emergencies Act*

Our Government recognizes the importance of coordinating with provinces, territories, and municipalities to ensure the safety and security of Canadians.

- 3 -

Targeted, time-limited, and proportional measures under the *Emergencies Act* would provide further support to police within your jurisdiction. This is not about displacing provincial or territorial jurisdiction, or superseding measures you have in place. This is about supplementing measures in your jurisdiction with additional legal authorities to give local law enforcement the maximum leverage to be able to uphold the rule of law and deal with the situation we are facing. We are not proposing to have the RCMP or any other authority supplant local law enforcement; rather, we wish to expand the range of tools available to law enforcement at all levels. We want to ensure that the federal response complements the efforts that your governments and municipalities continue to make to bring stability to the nation. The federal government continues to stand by to assist with resource asks, if and when required, to deal with the current situation.

I appreciate the views you shared yesterday on our call and I can assure you that they have been taken into account in the approaches we are taking, and will also inform the consultation report which will be tabled with the motion confirming the declaration. In addition to our discussions to date, briefings and discussions amongst officials in the coming days will also be useful. Consultation and coordination will continue to be essential on implementation which is consistent with the requirements of the *Emergencies Act* for consultations.

I would like to thank you, once again, for the discussion we have had on the *Emergencies Act* and I look forward to continue to get your perspective through this ongoing, consultative process. The federal government will continuously monitor and assess the implementation of the powers and authorities under the *Emergencies Act*, and stands ready to be able to respond to any need that emerges from premiers. The Minister of Public Safety will also have regular updates with his counterparts. Please follow up with me, or with Ministers Lametti, Mendicino, or LeBlanc, should you wish to discuss these matters further.

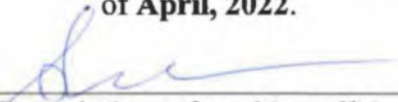
I am forwarding, for their information, a copy of this letter to David Lametti, Minister of Justice and Attorney General of Canada; Chrystia Freeland, Deputy Prime Minister and Minister of Finance; William Sterling Blair,

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President of the Queen's Privy Council for Canada and Minister of Emergency Preparedness; Marco E. L. Mendicino, Minister of Public Safety; and Dominic LeBlanc, Minister of Intergovernmental Affairs, Infrastructure and Communities.

Sincerely,

This is **Exhibit "C"** referred to
in the affidavit of
Steven Shragge
Affirmed before me this 4th day
of **April, 2022**.



A Commissioner for taking affidavits

LSO 63497W

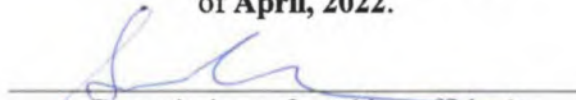
Motion for Confirmation of a Declaration of Emergency

That, pursuant to section 58 of the *Emergencies Act*, this House confirm the declaration of a public order emergency proclaimed on February 14, 2022.

Motion de ratification de la déclaration de situation de crise

Que, conformément à l'article 58 de la *Loi sur les mesures d'urgence*, cette Chambre ratifie la déclaration d'état d'urgence proclamée le 14 février 2022.

This is **Exhibit "D"** referred to
in the affidavit of
Steven Shragge
Affirmed before me this 4th day
of **April, 2022**.



A Commissioner for taking affidavits

LSO: 63497W



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

44th PARLIAMENT, 1st SESSION

44^e LÉGISLATURE, 1^{re} SESSION

JOURNALS

No. 36

Monday, February 21, 2022

7:00 a.m.

JOURNAUX

N° 36

Le lundi 21 février 2022

7 heures

The clerk informed the House of the unavoidable absence of the Speaker.

Whereupon, Mrs. Hughes (Algoma—Manitoulin—Kapusksing), Assistant Deputy Speaker and Deputy Chair of Committees of the Whole, took the chair, pursuant to Standing Order 8.

PRAYER

STATUTORY ORDER

The House resumed consideration of the motion of Mr. Mendicino (Minister of Public Safety), seconded by Mr. Trudeau (Prime Minister), — That, pursuant to section 58 of the Emergencies Act, this House confirm the declaration of a public order emergency proclaimed on February 14, 2022.

The debate continued.

STATEMENTS BY MEMBERS

Pursuant to Standing Order 31, members made statements.

ORAL QUESTIONS

Pursuant to Standing Order 30(5), the House proceeded to Oral Questions.

DAILY ROUTINE OF BUSINESS

Tabling of Documents

Pursuant to Standing Order 32(2), Ms. Dabrusin (Parliamentary Secretary to the Minister of Natural Resources and to the Minister of Environment and Climate Change) laid upon the table, — Document entitled "Green Municipal Fund Annual Report 2020-2021". — Sessional Paper No. 8525-441-8.

Le greffier informe la Chambre de l'absence inévitable du Président.

Sur ce, M^{me} Hughes (Algoma—Manitoulin—Kapusksing), vice-présidente adjointe de la Chambre et vice-présidente des comités pléniers, assume la présidence, conformément à l'article 8 du Règlement.

PRIÈRE

ORDRE LÉGAL

La Chambre reprend l'étude de la motion de M. Mendicino (ministre de la Sécurité publique), appuyé par M. Trudeau (premier ministre), — Que, conformément à l'article 58 de la Loi sur les mesures d'urgence, cette Chambre ratifie la déclaration d'état d'urgence proclamée le 14 février 2022.

Le débat se poursuit.

DÉCLARATIONS DE DÉPUTÉS

Conformément à l'article 31 du Règlement, des députés font des déclarations.

QUESTIONS ORALES

Conformément à l'article 30(5) du Règlement, la Chambre procède à la période de questions orales.

AFFAIRES COURANTES ORDINAIRES

Dépôt de documents

Conformément à l'article 32(2) du Règlement, M^{me} Dabrusin (secrétaire parlementaire du ministre des Ressources naturelles et du ministre de l'Environnement et du Changement climatique) dépose sur le bureau, — Document intitulé « Rapport annuel 2020-2021 du Fonds municipal vert ». — Document parlementaire n° 8525-441-8.

Presenting Reports from Committees

Ms. Chagger (Waterloo), from the Standing Committee on Procedure and House Affairs, presented the third report of the committee (items to remain votable). — Sessional Paper No. 8510-441-23.

Pursuant to Standing Order 91.1(2), the report was deemed concurred in.

STATUTORY ORDER

The House resumed consideration of the motion of Mr. Mendicino (Minister of Public Safety), seconded by Mr. Trudeau (Prime Minister), — That, pursuant to section 58 of the Emergencies Act, this House confirm the declaration of a public order emergency proclaimed on February 14, 2022.

The debate continued.

At 7:30 p.m., pursuant to order made Thursday, February 17, 2022, the Assistant Deputy Speaker interrupted the proceedings.

The question was put on the motion and it was agreed to on the following division:

(Division No. 32 — Vote n° 32)

YEAS: 185, NAYS: 151

POUR : 185, CONTRE : 151

YEAS — POUR

Aldag	Alghabra	Ali	Anand
Anandasangaree	Angus	Arseneault	Arya
Ashton	Atwin	Bachrach	Badawey
Bains	Baker	Barron	Battiste
Beech	Bendayan	Bennett	Bibeau
Bittle	Blaikie	Blair	Blaney
Blois	Boissonnault	Boulerice	Bradford
Brière	Cannings	Carr	Casey
Chagger	Chahal	Champagne	Chatel
Chen	Chiang	Collins (Hamilton East—Stoney Creek)	Collins (Victoria)
Cormier	Coteau	Dabrusin	Damoff
Davies	Desjarlais	Dhaliwal	Dhillon
Diab	Dong	Drouin	Dubourg
Duclos	Duguid	Duncan (Etobicoke North)	Dzerowicz
Ehsassi	El-Khoury	Erskine-Smith	Fergus
Fillmore	Fisher	Fonseca	Fortier
Fragiskatos	Fraser	Freeland	Fry
Gaheer	Garneau	Garrison	Gazan
Gerretsen	Gould	Green	Guilbeault
Hajdu	Hanley	Hardie	Hepfner
Holland	Housefather	Hughes	Hussen
Hutchings	Iacono	Idlout	Ien
Jaczek	Johns	Joly	Jones
Jowhari	Julian	Kayabaga	Kelloway
Khalid	Khera	Koutrakis	Kusmierczyk
Kwan	Lalonde	Lambropoulos	Lametti
Lamoureux	Lapointe	Lattanzio	Lauzon
LeBlanc	Lebouthillier	Lightbound	Long
Longfield	Louis (Kitchener—Conestoga)	MacAulay (Cardigan)	MacDonald (Malpeque)
MacGregor	MacKinnon (Gatineau)	Maloney	Martinez Ferrada
Masse	Mathysen	May (Cambridge)	May (Saanich—Gulf Islands)
McDonald (Avalon)	McGuinty	McKay	McKinnon (Coquitlam—Port Coquitlam)

Présentation de rapports de comités

M^{me} Chagger (Waterloo), du Comité permanent de la procédure et des affaires de la Chambre, présente le troisième rapport du Comité (affaires qui demeurent votables). — Document parlementaire n° 8510-441-23.

Conformément à l'article 91.1(2) du Règlement, le rapport est réputé adopté.

ORDRE LÉGAL

La Chambre reprend l'étude de la motion de M. Mendicino (ministre de la Sécurité publique), appuyé par M. Trudeau (premier ministre), — Que, conformément à l'article 58 de la Loi sur les mesures d'urgence, cette Chambre ratifie la déclaration d'état d'urgence proclamée le 14 février 2022.

Le débat se poursuit.

À 19 h 30, conformément à l'ordre adopté le jeudi 17 février 2022, la vice-présidente adjointe interrompt les délibérations.

La motion, mise aux voix, est agréée par le vote suivant :

McLeod	McPherson	Mendès	Mendicino
Miao	Miller	Morrissey	Murray
Naqvi	Ng	Noormohamed	O'Connell
Oliphant	O'Regan	Petitpas Taylor	Powlowski
Qualtrough	Robillard	Rodriguez	Rogers
Romanado	Sahota	Sajjan	Saks
Samson	Sarai	Scarpaleggia	Schiefke
Serré	Sgro	Shanahan	Sheehan
Sidhu (Brampton East)	Sidhu (Brampton South)	Singh	Sorbara
Spengemann	St-Onge	Sudds	Tassi
Taylor Roy	Thompson	Trudeau	Turnbull
Valdez	Van Bynen	van Koeverden	Vandal
Vandenbeld	Virani	Vuong	Weiler
Wilkinson	Yip	Zahid	Zarrillo
Zuberi — 185			

NAYS — CONTRE

Aboultaif	Aitchison	Albas	Allison
Arnold	Baldinelli	Barlow	Barrett
Barsalou-Duval	Beaulieu	Benzen	Bergen
Bergeron	Berthold	Bérubé	Bezan
Blanchet	Blanchette-Joncas	Block	Bragdon
Brassard	Brock	Brunelle-Duceppe	Calkins
Caputo	Carrie	Chabot	Chambers
Champoux	Chong	Cooper	Dalton
Dancho	Davidson	DeBellefeuille	Deltell
Desbiens	Desilets	Doherty	Dowdall
Dreeshen	Duncan (Stormont—Dundas— South Glengarry)	Ellis	Epp
Falk (Battlefords—Lloydminster)	Falk (Provencher)	Fast	Ferreri
Findlay	Fortin	Gallant	Garon
Gaudreau	Généreux	Genuis	Gill
Gladu	Godin	Goodridge	Gourde
Gray	Halfan	Hoback	Jeneroux
Kelly	Kitchen	Kmiec	Kram
Kramp-Neuman	Kurek	Kusie	Lake
Lantsman	Larouche	Lawrence	Lehoux
Lemire	Lewis (Essex)	Lewis (Haldimand—Norfolk)	Liepert
Lloyd	Lobb	MacKenzie	Maguire
Martel	Mazier	McCauley (Edmonton West)	McLean
Melillo	Michaud	Moore	Morantz
Morrice	Morrison	Motz	Muys
Nater	Normandin	O'Toole	Patzer
Paul-Hus	Pauzé	Perkins	Perron
Plamondon	Poillievre	Rayes	Redekopp
Reid	Rempel Garner	Richards	Roberts
Rood	Ruff	Savard-Tremblay	Scheer
Schmale	Seeback	Shields	Shipley
Simard	Sinclair-Desgagné	Small	Soroka
Steinley	Ste-Marie	Stewart	Strahl
Stubbs	Thériault	Therrien	Thomas
Tochor	Tolmie	Trudel	Uppal
Van Popta	Vecchio	Vidal	Vien
Viersen	Vignola	Villemure	Vis
Wagantall	Warkentin	Waugh	Webber
Williams	Williamson	Zimmer — 151	

PAIRED — PAIRÉS

Nil—Aucun

RETURNS AND REPORTS DEPOSITED WITH THE CLERK OF THE HOUSE

Pursuant to Standing Order 32(1), papers deposited with the Clerk of the House were laid upon the table as follows:

— by Mr. Champagne (Minister of Innovation, Science and Industry) — List of Commissions issued for the year 2021, pursuant to the Public Officers Act, R.S. 1985, c. P-31, s. 4. — Sessional Paper No. 8560-441-413-01. (*Pursuant to Standing Order 32(5), permanently referred to the Standing Committee on Industry and Technology*)

— by Mr. Wilkinson (Minister of Natural Resources) — Report on the administration and enforcement of the Energy Efficiency Act for the fiscal year ended March 31, 2021, pursuant to the Energy Efficiency Act, S.C. 1992, c. 36, s. 36. — Sessional Paper No. 8560-441-375-01. (*Pursuant to Standing Order 32(5), permanently referred to the Standing Committee on Natural Resources*)

ADJOURNMENT

At 8:23 p.m., pursuant to order made Thursday, February 17, 2022, the Assistant Deputy Speaker adjourned the House until Monday, February 28, 2022, at 11:00 a.m., pursuant to order made Thursday, February 17, 2022.

ÉTATS ET RAPPORTS DÉPOSÉS AUPRÈS DU GREFFIER DE LA CHAMBRE

Conformément à l'article 32(1) du Règlement, des documents remis au greffier de la Chambre sont déposés sur le bureau de la Chambre comme suit :

— par M. Champagne (ministre de l'Innovation, des Sciences et de l'Industrie) — Liste des commissions émises durant l'année 2021, conformément à la Loi sur les fonctionnaires publics, L.R. 1985, ch. P-31, art. 4. — Document parlementaire n° 8560-441-413-01. (*Conformément à l'article 32(5) du Règlement, renvoi en permanence au Comité permanent de l'industrie et de la technologie*)

— par M. Wilkinson (ministre des Ressources naturelles) — Rapport sur l'administration et l'application de la Loi sur l'efficacité énergétique pour l'exercice terminé le 31 mars 2021, conformément à la Loi sur l'efficacité énergétique, L.C. 1992, ch. 36, art. 36. — Document parlementaire n° 8560-441-375-01. (*Conformément à l'article 32(5) du Règlement, renvoi en permanence au Comité permanent des ressources naturelles*)

AJOURNEMENT

À 20 h 23, conformément à l'ordre adopté le jeudi 17 février 2022, la vice-présidente adjointe ajourne la Chambre jusqu'au lundi 28 février 2022, à 11 heures, conformément à l'ordre adopté le jeudi 17 février 2022.

Court File No.: T-347-22

FEDERAL COURT

B E T W E E N:

CANADIAN CONSTITUTION FOUNDATION

Moving Party / Applicant

and

ATTORNEY GENERAL OF CANADA

Responding Party / Respondent

and

ATTORNEY GENERAL OF ALBERTA

Intervenor

Written Representations of the Respondent, Attorney General of Canada

May 24, 2022

ATTORNEY GENERAL OF CANADA

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OVERVIEW

1. The constitutional validity of s. 39 of the *Canada Evidence Act*¹ is unchallenged in this application. The Court's plenary power cannot override the clear and plain intention of Parliament in s. 39 to preclude certified information from examination by a court or person. Consequently, the s. 39 certificate issued by the Interim Clerk of the Privy Council is presumed to be valid. The applicant has not adduced any evidence or raised any grounds to properly challenge the certificate. Rather the applicant merely speculates about the deliberations of ministers in a manner that goes to the heart of the purpose of confidentiality of Governor in Council (GIC) deliberations. This undermines the very purpose of s. 39, which the Supreme Court of Canada has clearly held is for ministers to feel at ease to express themselves freely in the GIC's deliberative process so that they can reconcile any different points of view and interests.

2. Any review of the s. 39 certificate must be within the boundaries set by the Supreme Court of Canada in *Babcock*: the information for which immunity is claimed must on its face fall within s. 39(1) and s. 39(2), and the Clerk cannot have improperly exercised the discretion conferred by s. 39(1). Much of the applicant's argument is premised on the improper conflation of the decision-maker, the GIC, with cabinet and the Incident Response Group (IRG), which leads it to misapprehend what is properly in the certified tribunal record.

¹ [Canada Evidence Act](#), RSC 1985, c. C-5, at s [39](#). [CEA]

3. The Court has before it the Proclamation Declaring a Public Order Emergency (the Declaration), the Emergency Measures Regulations and the Emergency Economic Measures Order (collectively, the Decision), as well as affidavit evidence that attaches the “explanation of the reasons for issuing the declaration” pursuant to s. 58 of the *Emergencies Act*² (the Reasons). The Reasons and other evidence provide ample basis for the Court to ensure adherence to the rule of law, including executive accountability to legal authority, and to protect the public from arbitrary executive action.

4. As a result, far from immunizing the Decision from meaningful, effective and fair judicial review, the materials currently before the Court permit it. The Court will be able to evaluate the “decision in light of its underlying rationale, so that the decision as a whole is transparent, intelligible and justified.”³

PART I – FACTS

A. General Background

5. The GIC issued the Declaration on February 14, 2022, followed by the remainder of the Decision on February 15, 2022.⁴

² [Emergencies Act](#), RSC 1985, c 22 (4th Supp) at s. 58 [*Emergencies Act*]

³ *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#), at para 15. (Vavilov)

⁴ Affidavit of Steven Shragge dated April 4, 2022 (the Shragge Affidavit) at paras 10 and 12, Responding Motion Record (RMR), Tab 1, p 6-7. The Shragge Affidavit is also attached as Ex. N to the Affidavit of Madeleine Ross sworn on April 22, 2022 (the Ross Affidavit) for this motion, Moving Party’s Motion Record (MPMR), Tab 3. Technically there are three decisions being judicially reviewed, however, they are referred to as the Decision in these submissions for convenience as they are a package.

6. The Reasons, a report to the Houses of Parliament pursuant to s. 58 of the *Emergencies Act*, were tabled in the House of Commons together with a motion for confirmation of the Declaration on February 16, 2022 and in the Senate on February 21, 2022. The House of Commons confirmed the motion on February 21. The Decision was revoked on February 23, 2022 before the Senate could vote.⁵

7. In response to the applicant's 317 request, on March 31, 2022, the Interim Clerk of the Privy Council issued a certificate pursuant to s. 39 claiming a confidence of the Queen's Privy Council for Canada over three submissions dated February 2022 to the GIC from the Minister of Public Safety and Emergency Preparedness including the signed ministerial recommendations, draft Orders in Council regarding a proposed proclamation, order and regulations, a draft proclamation, accompanying materials, and the records recording the Decision of the GIC.⁶

B. Cabinet and the Incident Response Group

8. Cabinet is the body of ministers that sets the federal government's policies and priorities.⁷ The Prime Minister chairs cabinet, which has a membership of 39 ministers.

9. The IRG is a working group of ministers that serves as a dedicated emergency committee in the event of a national crisis or during incidents elsewhere that have major implications for Canada. The group is responsible for coordinating the federal response

⁵ Shragge Affidavit, at paras 4, 13-15, RMR, Tab 1, p 7.

⁶ Ross Affidavit at paras 16 and 17, exhibits L and M. Exhibit L contains the certificate, MPMP Tab 3

⁷ Ross Affidavit at Exs. AA and BB [PM's [website](#)], MPMP Tab 3.

to an incident. Membership of the group varies and may consist of relevant ministers and senior government leadership, based on the nature of the incident.⁸

10. The IRG met on February 10, 12, and 13, 2022. Cabinet met on February 13, 2022.⁹

11. The Queen's Privy Council for Canada convened together with the Governor General to issue the Decision of February 14 and 15, 2022.¹⁰

PART II - ISSUES

12. The Attorney General of Canada (AGC) responds to the Canadian Constitution Foundation's (CCF) issues as follows:

- a) The minutes of the cabinet meeting of February 13, 2022 and of the IRG of February 10, 12, or 13, 2022 are not listed in the certificate of the Interim Clerk, issued in response to the applicant's Rule 317 request. However, they come within the definition of confidences of the Queen's Privy Council for Canada or cabinet confidences as defined in s. 39(2) of the *CEA*. They therefore cannot be delivered to the applicant.
- b) Items listed in a s. 39 *Canada Evidence Act* certificate cannot be disclosed to the applicant even on a counsel-only basis pursuant to a confidentiality undertaking.

⁸ Shragge Affidavit at paras 5-6, [PM's [website](#)], RMR Tab 1, p 6.

⁹ Shragge Affidavit, at paras 8 and 9, RMR Tab 1, p 6.

¹⁰ Ross Affidavit at Ex. M, letter from the Assistant Clerk of the Privy Council to the Federal Court dated March 14, 2022, MPMR Tab 3.

PART III – SUBMISSIONS

A. Statutory Provisions – Confidences of the Queen's Privy Council for Canada

Objection relating to a confidence of the Queen's Privy Council

39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

Definition

(2) For the purpose of subsection (1), **a confidence of the Queen's Privy Council for Canada** includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agenda of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

Opposition relative à un renseignement confidentiel du Conseil privé de la Reine pour le Canada

39 (1) Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le

renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada.

Définition

(2) Pour l'application du paragraphe (1), un **renseignement confidentiel du Conseil privé de la Reine pour le Canada** s'entend notamment d'un renseignement contenu dans :

- a) une note destinée à soumettre des propositions ou recommandations au Conseil;
- b) un document de travail destiné à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil;
- c) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions;
- d) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;
- e) un document d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa d);
- f) un avant-projet de loi ou projet de règlement.

B.T he Governor-in-Council (GIC) is the Tribunal

13. The IRG and cabinet are not the tribunal in this case as defined by s. 2 of the *Federal Courts Act*.¹¹ As the applicant correctly notes, judicial review is generally conducted on the record that was before the tribunal or decision-maker, in this case, the GIC.

¹¹ [*Federal Courts Act*](#), RSC, 1985, c. F-7 at [s 2](#) defines "federal board, commission or other tribunal" as meaning "any body, person or persons having, exercising or purporting to exercise the jurisdiction or powers conferred by or under an Act of Parliament".

14. While the difference between the GIC, as the formal executive, and cabinet, as the forum for political deliberation, is often overlooked, it is an important distinction to maintain in law. The legal powers of the state are vested in the formal executive and it constitutes the decision-maker. Cabinet itself makes no decisions having legal effect.

15. The constitutional distinction between the GIC and cabinet has been explained in an article favorably cited by the Supreme Court of Canada:

The informal and political character of cabinet "decision-making" not only makes secrecy essential to its proceedings but justifiable in an open and democratic society. In the early part of the twentieth century, Sir William Anson, founder of Oxford's law school, MP for the university from 1899 to 1914, and all-round constitutional icon, noted that "[t]he Cabinet shapes policy and settles what shall be done in important matters ... but it is not therefore the executive." Later, Sir Ivor Jennings, a late-comer to the subject but nonetheless professor of constitutional law at Cambridge at the time of his death in 1965, explained that:

Neither the Cabinet nor the prime minister, as such, claims to exercise any powers conferred by law. They take the decisions, but the acts which have legal effect are taken by others – the Queen, the Privy Council, a minister, a statutory commission and the like. Canadian authorities have made the same point: The prime minister and cabinet...exercise no formal powers; they decide how some regularly constituted authority – the Governor General, the Governor-in-Council, a particular minister – is to discharge functions with which that authority is legally entrusted and concerning which it will, as a matter of custom and convenience, accept direction from the prime minister and the cabinet.

Such is the informal place of the cabinet in constitutional law, rooted in its political function of establishing and maintaining collective responsibility.¹²

¹² *British Columbia (Attorney General) v. Provincial Court Judges Association of British Columbia [BC Judges]*, [2020 SCC 20](#) at paras [95-96](#), citing d'Ombra, Nicholas. "Cabinet Secrecy" (2004), 47(3) *Canadian Public Administration*, Vol. 47, No. 3 (Fall 2004), p 332, RMR Tab 4.

16. Under the Constitution, the authority to govern Canada is vested in the Queen, as represented by the Governor General.¹³ Section 13 of the *Constitution Act, 1867* defines the GIC, not cabinet, as a legal institution and elaborates on the relationship between the Queen's Privy Council for Canada and the GIC:

*13. The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.*¹⁴

17. Membership in the Privy Council mainly consists of all present and former Prime Ministers and ministers of the Crown. The cabinet is the collective of Privy Councillors who are ministers of the government of the day. By constitutional convention, only those Privy Councillors who are members of the government advise the Governor General. Unlike the Queen's Privy Council for Canada, the cabinet has no legal status and therefore exercises no legal powers.

18. Rather, the cabinet is a political body. It acts as the policy-making organ of the government. By convention, cabinet determines if, how and when formal executive powers are to be exercised. It is the confidential forum in which political and strategic considerations are brought to bear on proposed Crown actions, and in which consensus

¹³ *Constitution Act, 1867*, at ss [9](#), [10](#).

¹⁴ *Constitution Act, 1867*, at s [13](#)

can be achieved on decisions for which ministers are collectively responsible. It is above all a political forum to negotiate and deliberate.¹⁵

19. However, cabinet is not in any sense the legal executive. That is the role of the GIC.

20. The Supreme Court of Canada has recognized the distinction between these bodies, confirming that confidentiality extends to the deliberations of both, as well as to the records of their deliberations and to the documents that reflect on the content of those deliberations.¹⁶ Section 39 of the CEA acknowledges the same distinction between the bodies and also stipulates that the protections afforded under that provision extends to: “the Queen’s Privy Council for Canada, committees of the Queen’s Privy Council for Canada, Cabinet and committees of Cabinet.”¹⁷

21. The IRG is an *ad hoc* working group of ministers and other officials that has the mandate of coordinating the federal response to a given incident. The IRG is not the GIC.¹⁸ The s. 58 Reasons, however, make it clear that discussions before the IRG informed the decision-making of the GIC in this case and may therefore be relevant.¹⁹ Should these documents be otherwise admissible to form part of the Court’s record for

¹⁵ Mallory, J. R. *The Structure of Canadian Government* (Toronto: Macmillan, 1971) P. 96, RMR Tab 5.

¹⁶ *BC Judges* at [para 97](#), citing *Babcock v Canada (Attorney General)*, [2002 SCC 57](#) at [para 18](#) (*Babcock*)

¹⁷ CEA, s. [39\(3\)](#)

¹⁸ Prime Minister of Canada [website](#), Ross Affidavit, Ex. BB, MPMR Tab 3.

¹⁹ Reasons, at p 4, second last para: “The decision to issue the declaration was informed by... robust discussions at three meetings of the Incident Response Group on February 10, 12 and 13, 2022.” Shragge Affidavit, Ex. A, RMR Tab 1A, p 12.

review, the Interim Clerk will engage s. 39 of the CEA and make a determination as to whether the public interest in their disclosure outweighs the public interest in maintaining their confidentiality. They are not part of the certified tribunal record, however.

C. The Applicant is mistaken about what constitutes the Certified Tribunal Record

22. CCF's Rule 317 request was for "the record of materials before the Governor in Council in respect of the Emergency Proclamation... the Emergency Measures... [and] the Economic Measures."²⁰ This constitutes the certified tribunal record. The record before the Court on the underlying judicial review will be broader because of the affidavit evidence including the Reasons.

23. CCF has received the record that was before the GIC with the exception of those documents certified under s. 39 of the CEA.²¹ CCF did not seek documents of the IRG or a previous cabinet meeting in its request. "Rule 318(1) shows us that the material under Rule 317 must come from the administrative decision-maker, not others."²² The certified tribunal record is complete.

²⁰ CCF Notice of Application, at Rule 317 request at para 1-3, pp 22-23, MPMR Tab 1.

²¹ Section 39 Certificate of Interim Clerk of the Privy Council, Appendix "A" is found at Ex. L to the Ross Affidavit, MPMR Tab 3.

²² *Tsleil Waututh Nation v. Canada (Attorney General)*, [2017 FCA 128](#) (TWN) at para [107](#)

D. Section 39 of the *Canada Evidence Act* is Constitutional

24. Once a s. 39 certificate is in place, “disclosure of the information [certified] shall be refused without examination or hearing of the information by the court, person or body.”²³

25. CCF does not attack the validity of s. 39, which has been upheld as constitutionally sound by the Supreme Court of Canada.²⁴ The unwritten principles of the rule of law, independence of the judiciary, and separation of powers must be balanced against parliamentary supremacy.²⁵ Parliament has validly enacted s. 39 and it governs.

26. The confidentiality of the executive branch’s decision-making process is fundamental to the Canadian system of representative democracy based on the rule of law, responsible government, and the division of powers. The Supreme Court in *Babcock* recognized that “cabinet confidentiality is essential to good government.”²⁶ It protects the executive branch’s ability to perform its constitutionally assigned function.²⁷

27. Once certified, information under a certificate gains greater protection than at common law. To be valid, a certificate must be: (1) done by the Clerk or minister; (2) relate to information within s. 39(2); (3) done in a bona fide exercise of delegated power; and (4) done to prevent disclosure of hitherto confidential information. The applicant does not challenge the validity of s. 39.

²³ CEA, S [39\(1\)](#)

²⁴ *Babcock* at [para 8](#).

²⁵ *Ibid* at [paras 54–57](#).

²⁶ *Ibid* at [para 15](#).

²⁷ *BC Judges* at [para 66](#)

E. Disclosure of Section 39 documents to the Court or the parties is Prohibited

28. The language of s. 39 is clear that information that is certified under that provision is not to be provided to the Court or the parties. Two policy rationales that support the non-disclosure of confidences of the Queen's Privy Council for Canada and cabinet confidences are candour and solidarity.

i) Candour

29. First, the confidentiality of Queen's Privy Council and cabinet deliberations encourages full and frank debate. In *Babcock*, the Supreme Court of Canada stated that the British democratic tradition that informs Canadian tradition has long affirmed the confidentiality of what is said in the cabinet room and related records:

The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny... If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously...

The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court... recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.²⁸

²⁸ *Babcock* at [para 18](#) [citations omitted].

30. Confidentiality means that ministers are free to frankly express their views without fear to enable practical and inclusive decision-making.

ii) Solidarity

31. Secondly, confidentiality of cabinet deliberations allows cabinet solidarity to be maintained. Long-standing convention requires cabinet ministers to support collective decisions of cabinet or to resign. Ministers must maintain the confidence of a majority of the elected members of the House of Commons. If the government loses the confidence of the House of Commons, the government must resign or advise the Governor General to dissolve the House for an election. All cabinet ministers collectively accept responsibility for cabinet decisions.²⁹ In *BC Judges*, the Supreme Court of Canada reaffirmed the importance of the constitutional convention on cabinet confidentiality, and further explained:

There is a strong public interest in maintaining the confidentiality of deliberations among ministers of the Crown... As a matter of constitutional convention, Cabinet deliberations are confidential... Federal ministers swear an oath as Privy Counsellors to “honestly and truly declare [their] mind and [their] opinion” and to “keep secret all matters...secretly treated of” ...

Ministers enjoy freedom to express their views in Cabinet deliberations, but are expected to publicly defend Cabinet’s decision, even where it differs from their views...The confidentiality of Cabinet deliberations helps ensure that they are candid and frank and that what are often difficult decisions and hard-won compromises can be reached without

²⁹ Hogg, Peter W. *Constitutional Law of Canada*, 5th Edition. (Toronto, ON: Carswell, 2021) at ch. 9:7, RMR Tab 5.

*undue external interference... If Cabinet deliberations were made public, ministers could be criticized for publicly defending a policy inconsistent with their private views, which would risk distracting ministers and undermining public confidence in government.*³⁰

32. CCF's arguments squarely assail cabinet solidarity by seeking individual minister's deliberations regarding the Declaration. They speculate that doubts were raised and persisted, and that CCF's judicial review and a possible defeat of the motion to confirm the Declaration in the Senate caused the GIC to hastily revoke the emergency declaration. Resolving such implausible speculation is not the purpose of judicial review. Further, that type of debate is exactly what the absolute confidentiality of s. 39 is designed to protect.

33. Moreover, it is the decision to declare a public emergency, not its revocation that is at issue. The convention of cabinet solidarity makes individual views irrelevant. The reasonableness of the GIC's decision is what is to be reviewed by this Court.

34. The immateriality of deliberative records is reinforced by the general rule of deliberative secrecy for administrative tribunals, endorsed by the Supreme Court of Canada.³¹ The Nova Scotia Court of Appeal has confirmed that deliberative secrecy is necessary to help preserve the independence of decision-makers.³²

³⁰ *BC Judges* at [paras 95 and 96](#). [citations omitted]

³¹ *IBEW, Local 894 v Ellis-Don Ltd*, [2001 SCC 4](#) at paras 52-54.

³² *Cherubini Metal Works Ltd. v Nova Scotia (Attorney General)*, [2007 NSCA 37](#) at para [14](#). See also *TWN* at para [52](#).

F. No basis to override section 39

35. Under s. 39 of the CEA, the Clerk of the Privy Council must determine if the public interest in protecting the confidentiality of the information outweighs the public interest in its disclosure based on factors set out in caselaw.³³ When the Clerk asserts that information is immune from production on public interest grounds, she is not asserting a privilege, she is performing a duty. The Clerk exercises an authority prescribed by Parliament in order to protect a broader public interest in the maintenance of parliamentary governance. Public interest immunity is an exclusionary rule imposed on the AGC and other parties in certain circumstances, even when it is to their disadvantage in litigation.³⁴

36. The applicant's invitation to disregard the clear language of legislation found by the Supreme Court to be constitutionally valid and that sets out how courts are to treat confidences of the Queen's Privy Council, is without any foundation.³⁵ Plenary jurisdiction of this Court, no matter how broad, cannot override the clear and plain intention of Parliament in enacting s. 39. Plenary jurisdiction gives way to parliamentary supremacy. The Court's plenary jurisdiction to manage its own proceedings must be exercised within the parameters of valid statutory provisions.³⁶

³³ *Babcock* at [paras 23](#); *BC Judges* at [para 101](#) citing *Carey v. Ontario*, [1986 CanLII 7 \(SCC\)](#), [1986] 2 SCR 637.

³⁴ *Makanjuola v. Commissioner of Police of the Metropolis*, [1992] 3 All E.R. 617 at p. 623, RMR Tab 3.

³⁵ *Babcock* at [paras 55, 56, 57, 60 and 61](#) and citing *Singh v. Canada (Attorney General)*, [2000 CanLII 17100](#) (FCA)

³⁶ *Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, 2022 FCA 67, [para 8](#).

37. Indeed, there are many cases in which the Federal Court of Appeal underlines the importance of applying the authentic meaning of valid statutes, which bind the Court and the parties. For example:

*This principle reflects what this Court described in Tsleil-Waututh Nation v. Canada (Attorney General) at para 82, as the “hierarchy of law.” Under the hierarchy of law, a statutory provision takes precedence over subordinate legislation and over the common law. Express procedural choices made by the legislator bind a reviewing court.*³⁷

38. The integrity of the Court's process is not impugned by a s. 39 certificate. The Supreme Court in *Babcock* was unambiguous: “Issues of production pursuant to s. 39 of the CEA fall to be resolved by the Clerk or minister responsible for balancing the public interest.”³⁸ This is especially so in this case where the statutory scheme sets out significant parliamentary supervision of the Decision and provides for the government to provide the Reasons under s. 58.³⁹

39. A court order to produce s. 39 confidences for its own review or for inspection by applicant's counsel to “ensure that it is tested in an adversarial proceeding” would defeat the purpose of s. 39. This would be a clear error in law.

³⁷ *Sturgeon Lake Cree Nation v. Hamelin*, [2018 FCA 131](#) (CanLII) at para. [54](#) citing *Canada (Attorney General) v. Herrera-Morales*, [2017 FCA 163](#) at para. [66](#).

³⁸ *Babcock* at [para 32](#).

³⁹ *Emergencies Act*, at [Part VI](#).

G.A. Allegations of bias and abuse of process are unfounded

40. The applicant alleges that the interim clerk was biased when she determined the public interest in disclosure under s. 39 of the CEA did not outweigh the public confidentiality interest in this case.⁴⁰ *Babcock* stated that the clerk's function under s 39 is "to protect Cabinet confidences, and this alone. It is not to thwart public inquiry nor is it to gain tactical advantage in litigation. If it can be shown from the evidence or the circumstances that the power of certification was exercised for purposes outside those contemplated by s. 39, the certification may be set aside as an unauthorized exercise of executive power."⁴¹ There is no evidence upon which this Court could conclude that the Interim Clerk acted improperly when certifying the GIC's information under s. 39.

41. The applicant has not brought a judicial review of the Interim Clerk's decision, as contemplated in *Babcock*.⁴² The applicant has also failed to adduce any evidence which would even suggest that the Interim Clerk exercised her discretion improperly. Rather the allegation is based entirely on conjecture and an unsubstantiated assumption of bad faith.

⁴⁰ CCF Written Submissions at para 41, MPMR Tab 2.

⁴¹ *Babcock* at [para 25](#), citing *Roncarelli v. Duplessis*, [1959 CanLII 50 \(SCC\)](#), [1959] S.C.R. 121.

⁴² *Babcock* at paras [39-41](#).

42. It is incumbent upon an applicant to lead evidence to support allegations of bias. Absent such evidence, the Court is left with a bald assertion that a reasonable apprehension of bias exists whenever s. 39 is invoked in litigation in which the Crown has an interest. The Supreme Court's finding in *Babcock* that s. 39 does not offend the rule of law makes the applicant's position untenable.⁴³

43. The Court in *Babcock* acknowledged that protection or disclosure of information under s. 39 to gain a strategic advantage would be improper and would invalidate the certification. However, the Court held that the ordinary rules of litigation offer protection from such abuse. For example, the applicant's right to cross-examine government witnesses on the information produced provides an opportunity to identify evidence of impropriety. Such evidence may be used to support a party's request that an adverse inference be drawn in relation to material improperly withheld under s. 39.⁴⁴ No such evidence has been adduced or alleged to exist in the present case.

H. The s. 39 certificate does not insulate the Decision from Review

44. Contrary to the applicant's assertions, the impact of the s. 39 certificate is not a relevant consideration in assessing the validity of the certificate.⁴⁵

⁴³ *Babcock* at [para 57](#).

⁴⁴ *Babcock* at [para 36](#).

⁴⁵ *TWN* at para [49](#); CCF Written Submissions at paras 1, 5, 7, and 9, MPMR Tab 2.

45. In addressing concerns about immunization from meaningful review, the Federal Court of Appeal in *Tsleil-Waututh Nation* did not share the applicant's concern that the s. 39 certificate had the effect of immunizing the decision of the GIC from review:

*In a sense, this sort of effect caused by a certificate is nothing new. Administrative tribunals can rely on deliberative secrecy and, thus, can withhold key information from the applicant for judicial review... Legal professional privilege can also apply even on key issues in the judicial review....In these cases, the reviews of the administrative decision-makers still went ahead. The withholding of just some materials from the reviewing court does not, by itself, necessarily mean that the administrative decision-maker is being immunized from review.*⁴⁶

46. The judicial review in this case will be informed by the certified tribunal record, the Reasons of the GIC laid before Parliament pursuant to s. 58 as well as consultations and other contextual information, consistent with the Supreme Court's statement in *Vavilov* that deferential reasonableness review "requires approaching each administrative decision on its own terms and in its own context."⁴⁷ This will form the basis for effective, meaningful and fair judicial review. It ensures that the Court has room to ensure adherence to the rule of law including executive accountability to legal authority and to protect the public from arbitrary executive action.

47. The s. 58 Reasons were prepared by the government and, in accordance with the statutory scheme of the *Emergencies Act*, tabled by the Minister of Public Safety in both Houses of Parliament to provide "an explanation of the reasons" for the invocation of the

⁴⁶ *Ibid*, para [52](#) [citations omitted]

⁴⁷ *Vavilov*, [2019 SCC 65](#), at para [293](#).

Declaration.⁴⁸ Since the Reasons refer to “robust discussions at three meetings of the IRG on February 10, 12, and 13, 2022,”⁴⁹ if the Court considers the minutes of those meetings producible, the Interim Clerk will engage s. 39 of the CEA to determine whether the public interest in their disclosure outweighs the public interest in their confidentiality.

48. Courts have judicially reviewed decisions of the GIC without the benefit of documents protected by s. 39. A preamble to an Order in Council together with an explanatory note were held to be sufficient to conduct a judicial review in *Coldwater First Nation*.⁵⁰ Deliberations of ministers were not necessary, just as deliberations of an appeal court are not necessary to the Supreme Court of Canada undertaking an appeal.

49. The applicant relies on the decision of the Court of Appeal in *Canadian Council for Refugees* to support its request to review the documents after giving an undertaking of confidentiality. In that case, the Court set out three possibilities for Courts to ensure meaningful review can occur where they would otherwise be unable to ascertain the reasoning of the tribunal.⁵¹ One of these possibilities involved counsel reviewing the documents after undertaking an oath of confidentiality. None of the cases cited by the applicant overrode a s. 39 certificate protecting information from disclosure. The Court

⁴⁸ *Emergencies Act*, at [s. 58](#). The Reasons are attached to the Steven Shragge affidavit, at para 4, Ex. A, RMR Tab 1A, pp 5 and 8-22.

⁴⁹ Reasons, at p 4, second last para, Shragge Affidavit, Ex. A, RMR Tab 1A, p 12.

⁵⁰ *Coldwater First Nation v Canada (Attorney General)*, [2020 FCA 34](#) (*Coldwater*), cited in *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, [2021 FCA 72](#) (*Cdn Council for Refugees*) at [para 114](#). Further, the applicants are mistaken in saying the Crown Consultation and Accommodation Report was a full account of cabinet deliberations: *Coldwater* at [paras 70-71](#).

⁵¹ *Cdn Council for Refugees* at paras [114-119](#); leave to appeal granted at [2021 CanLII 129759](#) (SCC); CCF Written submissions at paras 37-39, MPMR Tab 2.

of Appeal did not suggest that any of the solutions set out would apply to override the clear and unchallenged language of s. 39. Absent a finding that s. 39 is unconstitutional, the Court is obliged to apply it as intended by Parliament.

50. Further, the applicant ignores that the Court restricted the use of these possibilities to cases where the decision would otherwise not be capable of review:

For a long time now, Canadian courts have opposed attempts by public authorities to immunize administrators completely from judicial review, whether that be done by full privative clauses or the withholding of evidence or explanations essential for a meaningful review. The complete barring of review by a court... is an unwarranted interference with the core, constitutional powers of the judiciary and the constitutional principle of the rule of law ... Put positively, Crevier stands for the proposition that there must always be at least some prospect or degree of review... This principle is limited to the complete ousting of any review of an administrative decision, not legislative limitations on the availability or scope of review...⁵²

51. Section 39 of the CEA does not constitute a complete ousting of judicial review of a decision of the Clerk; it simply sets limits as to what can be produced once a s. 39 certificate is issued. Such limits do not stop meaningful judicial review.⁵³

52. The applicant further ignores that one of the three possibilities outlined in *Canadian Council for Refugees* is implemented in this case: a summary is contained in the affidavit of Steven Shragge, which attaches the Reasons and other documents. Together with the certified tribunal record and other contextual information, this allows as much information

⁵² *Cdn Council for Refugees* at [para 102](#) [citations omitted; emphasis added]

⁵³ See: *Portnov v. Canada*, [2021 FCA 171](#) at paras [53-54](#).

as possible to be placed before the parties and the Court without breaching confidences of the Queen's Privy Council. It will allow the Court conducting the review "to properly consider both the outcome of the [D]ecision and the reasoning process that led to the outcome," as required by *Vavilov*.⁵⁴

I. Conclusion

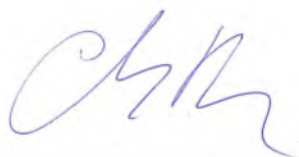
53. The s. 39 certificate in this case is valid and effective. No evidence that the provision was improperly invoked has been led. Section 39 affirms the solid policy rationales of candour and solidarity in the clear and plain meaning of s. 39. The applicant does not challenge the constitutional validity of s. 39. The Court's plenary powers, regardless of how broad, do not override constitutionally valid legislation.

PART IV – ORDER SOUGHT

54. The Attorney General of Canada therefore asks that this application be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa this 25th day of May 2022.



Christopher Rupar
of Counsel for the Respondent,
Attorney General of Canada



Kathleen Kohlman
of Counsel for the Respondent,
Attorney General of Canada

⁵⁴ *Vavilov*, at para [87](#).

PART V – LIST OF AUTHORITIES

CASELAW

1. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#)
2. *British Columbia (Attorney General) v. Provincial Court Judges Association of British Columbia*, [2020 SCC 20](#)
3. *Babcock v. Canada (Attorney General)*, [2002 SCC 57](#), [2002] 3 SCR 3
4. *Tsleil Waututh Nation v. Canada (Attorney General)*, [2017 FCA 128](#)
5. *IBEW, Local 894 v Ellis-Don Ltd*, [2001 SCC 4](#)
6. *Cherubini Metal Works Ltd. v Nova Scotia (Attorney General)*, [2007 NSCA 37](#)
7. *Carey v. Ontario*, [1986 CanLII 7 \(SCC\)](#), [1986] 2 SCR 637
8. *Makanjuola v. Commissioner of Police of the Metropolis* , [1992] 3 All E.R.
9. *Singh v. Canada (Attorney General)*, [2000 CanLII 17100](#) (FCA)
10. *Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, [2022 FCA 67](#)
11. *TSW Sturgeon Lake Cree Nation v. Hamelin*, [2018 FCA 131](#)
12. *Canada (Attorney General) v. Herrera-Morales*, [2017 FCA 163](#)
13. *Roncarelli v. Duplessis*, [1959 CanLII 50 \(SCC\)](#), [1959] S.C.R. 121
14. *Coldwater First Nation v Canada (Attorney General)*, [2020 FCA 34](#)
15. *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, [2021 FCA 72](#)
16. *Portnov v. Canada*, [2021 FCA 171](#)

SECONDARY SOURCES

17. d'Ombrain, Nicholas. "Cabinet secrecy" (2004), 47(3) *Canadian Public Administration*, Vol. 47, No. 3 (Fall 2004), p 332.
18. Mallory, J. R. *The Structure of Canadian Government* (Toronto: Macmillan, 1971)
19. Hogg, Peter W. *Constitutional Law of Canada, 5th Edition*. (Scarborough, ON: Thomson Carswell, 2007)

APPENDIX A – STATUTES AND REGULATIONS

<i>Canada Evidence Act,</i> R.S.C., 1985, c. C-5 39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body. Definition (2) For the purpose of subsection (1), a <i>confidence of the Queen's Privy Council for Canada</i> includes, without restricting the generality thereof, information contained in (a) a memorandum the purpose of which is to present proposals or recommendations to Council; (b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions; (c) an agendum of Council or a record recording deliberations or decisions of Council; (d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; (e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or	<i>Loi sur la preuve au Canada, L.R.C. (1985),</i> ch. C-5 39 (1) Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada. Définition (2) Pour l'application du paragraphe (1), un <i>renseignement confidentiel du Conseil privé de la Reine pour le Canada</i> s'entend notamment d'un renseignement contenu dans : a) une note destinée à soumettre des propositions ou recommandations au Conseil; b) un document de travail destiné à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil; c) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions; d) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique; e) un document d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa d); f) un avant-projet de loi ou projet de règlement.
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discussions referred to in paragraph (d); and (f) draft legislation. Definition of Council (3) For the purposes of subsection (2), Council means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet. Exception (4) Subsection (1) does not apply in respect of (a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or (b) a discussion paper described in paragraph (2)(b) (i) if the decisions to which the discussion paper relates have been made public, or (ii) where the decisions have not been made public, if four years have passed since the decisions were made.	Définition de Conseil (3) Pour l'application du paragraphe (2), Conseil s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs. Exception (4) Le paragraphe (1) ne s'applique pas : a) à un renseignement confidentiel du Conseil privé de la Reine pour le Canada dont l'existence remonte à plus de vingt ans; b) à un document de travail visé à l'alinéa (2)b), dans les cas où les décisions auxquelles il se rapporte ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.
<i>Emergencies Act, R.S.C., 1985, c. 22 (4th Supp.), PART VI</i> Parliamentary Supervision <i>Interpretation</i> Definitions 57 In this Part, declaration of emergency means a proclamation issued pursuant to subsection 6(1), 17(1), 28(1) or 38(1); (<i>déclaration de situation de crise</i>) Parliamentary Review Committee means the committee referred to in subsection 62(1); (<i>comité d'examen parlementaire</i>)	<i>Loi sur les mesures d'urgence, L.R.C. (1985), ch. 22 (4^e suppl.), PARTIE VI</i> Suivi parlementaire <i>Définitions</i> 57 Les définitions qui suivent s'appliquent à la présente partie. comité d'examen parlementaire Le comité visé au paragraphe 62(1). (<i>Parliamentary Review Committee</i>) déclaration de situation de crise La proclamation prise en application des paragraphes 6(1), 17(1), 28(1) ou 38(1). (<i>declaration of emergency</i>) jour de séance Jour de séance d'une chambre du Parlement. (<i>sitting day</i>)

sitting day, in respect of a House of Parliament, means a day on which that House is sitting. (<i>jour de séance</i>) <i>Consideration of Declaration of Emergency</i> Tabling in Parliament when sitting 58 (1) Subject to subsection (4), a motion for confirmation of a declaration of emergency, signed by a minister of the Crown, together with an explanation of the reasons for issuing the declaration and a report on any consultation with the lieutenant governors in council of the provinces with respect to the declaration, shall be laid before each House of Parliament within seven sitting days after the declaration is issued. Summoning Parliament or House (2) If a declaration of emergency is issued during a prorogation of Parliament or when either House of Parliament stands adjourned, Parliament or that House, as the case may be, shall be summoned forthwith to sit within seven days after the declaration is issued. Summoning Parliament (3) If a declaration of emergency is issued at a time when the House of Commons is dissolved, Parliament shall be summoned to sit at the earliest opportunity after the declaration is issued. Tabling in Parliament after summoned (4) Where Parliament or a House of Parliament is summoned to sit in accordance with subsection (2) or (3), the motion, explanation and report described in subsection (1) shall be laid before each House of Parliament or that House of Parliament, as the case may be, on the first sitting day after Parliament or that House is summoned.	<i>Étude des déclarations de situation de crise</i> Dépôt devant le Parlement en session 58 (1) Sous réserve du paragraphe (4), il est déposé devant chaque chambre du Parlement, dans les sept jours de séance suivant une déclaration de situation de crise, une motion de ratification de la déclaration signée par un ministre et accompagnée d'un exposé des motifs de la déclaration ainsi que d'un compte rendu des consultations avec les lieutenants-gouverneurs en conseil des provinces au sujet de celle-ci. Convocation du Parlement ou d'une chambre (2) Si la déclaration est faite pendant une prorogation du Parlement ou un ajournement d'une de ses chambres, le Parlement, ou cette chambre, selon le cas, est immédiatement convoqué en vue de siéger dans les sept jours suivant la déclaration. Dissolution de la Chambre des communes (3) Si la déclaration est faite alors que la Chambre des communes est dissoute, le Parlement est convoqué en vue de siéger le plus tôt possible après la déclaration. Dépôt devant le Parlement après convocation (4) Dans les cas où le Parlement, ou une de ses chambres, est convoqué conformément aux paragraphes (2) ou (3), la motion, l'exposé et le compte rendu visés au paragraphe (1) sont déposés devant chaque chambre du Parlement ou devant cette chambre, selon le cas, le premier jour de séance suivant la convocation. Étude (5) La chambre du Parlement saisie d'une motion en application des paragraphes (1) ou (4) étudie celle-ci dès le jour de séance suivant celui de son dépôt.
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Consideration (5) Where a motion is laid before a House of Parliament as provided in subsection (1) or (4), that House shall, on the sitting day next following the sitting day on which the motion was so laid, take up and consider the motion. Vote (6) A motion taken up and considered in accordance with subsection (5) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion. Revocation of declaration (7) If a motion for confirmation of a declaration of emergency is negated by either House of Parliament, the declaration, to the extent that it has not previously expired or been revoked, is revoked effective on the day of the negative vote and no further action under this section need be taken in the other House with respect to the motion. <i>Revocation of Declaration of Emergency</i> Motion for revocation 59 (1) Where a motion, for the consideration of the Senate or the House of Commons, to the effect that (a) a declaration of emergency under Part I or II be revoked either generally or with respect to any area of Canada, or (b) a declaration of emergency under Part III or IV be revoked, signed by not less than ten members of the Senate or twenty members of the House of Commons, as the case may be, is filed with the Speaker thereof, that House of Parliament shall take up and	Mise aux voix (6) La motion mise à l'étude conformément au paragraphe (5) fait l'objet d'un débat ininterrompu; le débat terminé, le président de la chambre met immédiatement aux voix toute question nécessaire pour décider de la motion. Abrogation de la déclaration (7) En cas de rejet de la motion de ratification de la déclaration par une des chambres du Parlement, la déclaration, sous réserve de sa cessation d'effet ou de son abrogation antérieure, est abrogée à compter de la date du vote de rejet et l'autre chambre n'a pas à intervenir sur la motion. <i>Abrogation d'une déclaration de situation de crise</i> Motion d'abrogation 59 (1) Dans les cas où le président du Sénat ou de la Chambre des communes est saisi d'une motion signée par au moins dix sénateurs ou vingt députés, selon le cas, demandant l'abrogation d'une déclaration de situation de crise prévue par les parties I ou II généralement ou à l'égard d'une zone du Canada, ou d'une telle déclaration prévue par les parties III ou IV, cette chambre étudie cette motion dans les trois jours de séance suivant la saisine. Mise aux voix (2) La motion mise à l'étude conformément au paragraphe (1) fait l'objet d'un débat ininterrompu d'une durée maximale de dix heures; le débat terminé, le président de la chambre met immédiatement aux voix toute question nécessaire pour décider de la motion. Abrogation de la déclaration
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consider the motion within three sitting days after it is filed.

Vote

(2) A motion taken up and considered in accordance with subsection (1) shall be debated without interruption for not more than ten hours and, on the expiration of the tenth hour or at such earlier time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

Revocation of declaration

(3) If a motion debated in accordance with subsection (2) is adopted by the House, the declaration, to the extent that it has not previously expired or been revoked, is revoked in accordance with the motion, effective on the day specified in the motion, which day may not be earlier than the day of the vote adopting the motion.

Consideration of Continuation or Amendment of Declaration of Emergency

Motion for confirmation of proclamation continuing a declaration

60 (1) A motion for confirmation of a proclamation continuing a declaration of emergency and of any orders and regulations named in the motion pursuant to subsection (3), signed by a minister of the Crown, together with an explanation of the reasons for issuing the proclamation, a report on any consultation with the lieutenant governors in council of the provinces with respect to the proclamation and a report on the review of orders and regulations conducted before the issuing of the proclamation, shall be laid before each

(3) En cas d'adoption d'une motion conformément au paragraphe (2) par une chambre, la déclaration est, sous réserve de sa cessation d'effet ou de son abrogation antérieure, abrogée conformément à la motion dès la date prévue par la motion; cette date ne peut toutefois pas être antérieure à celle de l'adoption de la motion.

Étude de la prorogation ou de la modification d'une déclaration de situation de crise

Motion de ratification de la prorogation

60 (1) Il est déposé devant chaque chambre du Parlement, dans les sept jours de séance suivant la prise d'une proclamation de prorogation d'une déclaration de situation de crise, une motion de ratification de la proclamation et des décrets et règlements mentionnés dans la motion en conformité avec le paragraphe (3), signée par un ministre et accompagnée d'un exposé des motifs de la prise de la proclamation, d'un compte rendu des consultations avec les lieutenants-gouverneurs des provinces au sujet de la proclamation, ainsi que d'un rapport de l'examen des décrets et règlements effectué avant la prise de la proclamation.

Motion de ratification de la modification

(2) Il est déposé devant chaque chambre du Parlement, dans les sept jours de séance suivant la prise d'une proclamation de modification d'une déclaration de situation de crise, une motion de ratification de la proclamation signée par un ministre et accompagnée d'un exposé des motifs de la prise de la proclamation et d'un compte rendu des consultations avec les lieutenants-gouverneurs des provinces au sujet de la proclamation.

Mention des décrets et règlements

(3) Une motion de ratification d'une proclamation de prorogation d'une déclaration de situation de crise mentionne les décrets et

House of Parliament within seven sitting days after the proclamation is issued.

Motion for confirmation of proclamation amending a declaration

(2) A motion for confirmation of a proclamation amending a declaration of emergency, signed by a minister of the Crown, together with an explanation of the reasons for issuing the proclamation and a report on any consultation with the lieutenant governors in council of the provinces with respect to the proclamation, shall be laid before each House of Parliament within seven sitting days after the proclamation is issued.

Orders and regulations named

(3) A motion for confirmation of a proclamation continuing a declaration of emergency shall name the orders and regulations in force on the issuing of the proclamation that the Governor in Council believed, on reasonable grounds, continued at that time to be necessary or, in the case of a proclamation issued pursuant to subsection 43(1), advisable, for dealing with the emergency.

Consideration

(4) Where a motion is laid before a House of Parliament as provided in subsection (1) or (2), that House shall, on the sitting day next following the sitting day on which the motion was so laid, take up and consider the motion.

Vote

(5) A motion taken up and considered in accordance with subsection (4) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

règlements qui sont en vigueur lors de la prise de la proclamation et dont le gouverneur en conseil croit, pour des motifs raisonnables, la prorogation nécessaire à ce moment ou, dans le cas d'une proclamation prise en vertu du paragraphe 43(1), opportune pour faire face à la situation de crise.

Étude

(4) La chambre du Parlement saisie d'une motion en application des paragraphes (1) ou (2) étudie celle-ci dès le jour de séance suivant celui de son dépôt.

Mise aux voix

(5) La motion mise à l'étude conformément au paragraphe (4) fait l'objet d'un débat ininterrompu; le débat terminé, le président de la chambre met immédiatement aux voix toute question nécessaire pour décider de la motion.

Abrogation de la proclamation

(6) En cas de rejet de la motion de ratification de la proclamation par une des chambres du Parlement, la proclamation, sous réserve de sa cessation d'effet ou de son abrogation antérieure, est abrogée à compter de la date du vote de rejet et l'autre chambre n'a pas à intervenir sur la motion.

Abrogation des décrets et règlements

(7) Si une motion de ratification d'une proclamation de prorogation d'une déclaration de situation de crise est modifiée par une chambre du Parlement par la suppression d'un décret ou d'un règlement qui, en application du paragraphe (3), y est mentionné, le décret ou le règlement en question est abrogé à compter du jour de l'adoption de la motion.

Décrets et règlements

Dépôt devant le Parlement

61 (1) Sous réserve du paragraphe (2), les décrets ou règlements pris par le gouverneur en conseil en application de la présente loi

Revocation of proclamation (6) If a motion for confirmation of a proclamation is negated by either House of Parliament, the proclamation, to the extent that it has not previously expired or been revoked, is revoked effective on the day of the negative vote and no further action under this section need be taken in the other House with respect to the motion. Revocation of orders or regulations (7) If a motion for confirmation of a proclamation continuing a declaration of emergency is amended by either House of Parliament by the deletion therefrom of an order or regulation named in the motion pursuant to subsection (3), the order or regulation is revoked effective on the day on which the motion, as amended, is adopted. <i>Orders and Regulations</i> Tabling in Parliament 61 (1) Subject to subsection (2), every order or regulation made by the Governor in Council pursuant to this Act shall be laid before each House of Parliament within two sitting days after it is made. Reference to Committee (2) Where an order or regulation made pursuant to this Act is exempted from publication in the <u>Canada Gazette</u> by regulations made under the <u>Statutory Instruments Act</u>, the order or regulation, in lieu of being laid before each House of Parliament as required by subsection (1), shall be referred to the Parliamentary Review Committee within two days after it is made or, if the Committee is not then designated or established, within the first two days after it is designated or established. Motion for revocation or amendment	sont déposés devant chaque chambre du Parlement dans les deux jours de séance suivant la date de leur prise. Renvoi au comité (2) Lorsqu'un décret ou un règlement d'application de la présente loi est soustrait à la publication dans la <u>Gazette du Canada</u> par les règlements d'application de la <u>Loi sur les textes réglementaires</u>, le décret ou le règlement, plutôt que d'être déposé conformément au paragraphe (1), est renvoyé au comité d'examen parlementaire dans les deux jours suivant sa prise ou, si le comité n'est pas alors constitué, dans les deux premiers jours suivant sa constitution. Motion d'abrogation ou de modification (3) Dans les cas où le président du Sénat ou de la Chambre des communes est saisi d'une motion signée par au moins dix sénateurs ou vingt députés, selon le cas, demandant l'abrogation ou la modification d'un décret ou d'un règlement déposé devant la chambre en application du paragraphe (1), cette chambre étudie la motion dans les trois jours de séance suivant la saisine. Mise aux voix (4) La motion mise à l'étude conformément au paragraphe (3) fait l'objet d'un débat ininterrompu; le débat terminé, le président de la chambre met immédiatement aux voix toute question nécessaire pour décider de la motion. Motion d'agrément (5) En cas d'adoption d'une motion conformément au paragraphe (4) par une chambre, celle-ci adresse un message à l'autre chambre pour l'en informer et requérir son agrément. Étude (6) La chambre dont l'agrément est requis en application du paragraphe (5) étudie la motion
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(3) Where a motion, for the consideration of the Senate or the House of Commons, to the effect that an order or regulation laid before it pursuant to subsection (1) be revoked or amended, signed by not less than ten members of the Senate or twenty members of the House of Commons, as the case may be, is filed with the Speaker thereof, that House of Parliament shall take up and consider the motion within three sitting days after it is filed. Vote (4) A motion taken up and considered in accordance with subsection (3) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion. Motion for concurrence (5) If a motion debated in accordance with subsection (4) is adopted by the House, a message shall forthwith be sent from that House informing the other House that the motion has been so adopted and requesting that the motion be concurred in by that other House. Consideration (6) Where a request for concurrence in a motion is made pursuant to subsection (5), the House to which the request is made shall take up and consider the motion within three sitting days after the request is made. Vote on motion for concurrence (7) A motion taken up and considered in accordance with subsection (6) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put	adoptée par l'autre chambre dans les trois jours de séance suivant la requête. Mise aux voix (7) La motion mise à l'étude conformément au paragraphe (6) fait l'objet d'un débat ininterrompu; le débat terminé, le président de la chambre met immédiatement aux voix toute question nécessaire pour décider de la motion. Abrogation ou modification du décret ou du règlement (8) Le décret ou le règlement qui fait l'objet d'une motion étudiée en application du paragraphe (6) et agréée est abrogé ou modifié conformément à la motion dès la date prévue par celle-ci; cette date ne peut toutefois pas être antérieure à celle de l'agrément. <i>Comité d'examen parlementaire</i> Examen 62 (1) L'exercice des attributions découlant d'une déclaration de situation de crise est examiné par un comité mixte de la Chambre des communes et du Sénat désigné ou constitué à cette fin. Composition du comité (2) Siègent au comité d'examen parlementaire au moins un député de chaque parti dont l'effectif reconnu à la Chambre des communes comprend au moins douze personnes, et au moins un sénateur de chaque parti, représenté au Sénat, dont un député appartient au comité. Serment de secret (3) Les membres du comité d'examen parlementaire et son personnel prêtent le serment de secret figurant à l'annexe. Réunions à huis clos
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every question necessary for the disposition of the motion.

Revocation or amendment of order or regulation

(8) If a motion taken up and considered in accordance with subsection (6) is concurred in, the order or regulation is revoked or amended in accordance with the motion, effective on the day specified in the motion, which day may not be earlier than the day of the vote of concurrence.

Parliamentary Review Committee

Review by Parliamentary Review Committee

62 (1) The exercise of powers and the performance of duties and functions pursuant to a declaration of emergency shall be reviewed by a committee of both Houses of Parliament designated or established for that purpose.

Membership

(2) The Parliamentary Review Committee shall include at least one member of the House of Commons from each party that has a recognized membership of twelve or more persons in that House and at least one senator from each party in the Senate that is represented on the committee by a member of the House of Commons.

Oath of secrecy

(3) Every member of the Parliamentary Review Committee and every person employed in the work of the Committee shall take the oath of secrecy set out in the schedule.

Meetings in private

(4) Every meeting of the Parliamentary Review Committee held to consider an

(4) Les réunions du comité d'examen parlementaire en vue de l'étude des décrets ou règlements qui lui sont renvoyés en application du paragraphe 61(2) se tiennent à huis clos.

Abrogation ou modification

(5) Si, dans les trente jours suivant le renvoi prévu par le paragraphe 61(2), le comité d'examen parlementaire adopte une motion d'abrogation ou de modification d'un décret ou d'un règlement ayant fait l'objet du renvoi, cette mesure s'applique dès la date prévue par la motion; cette date ne peut toutefois pas être antérieure à celle de l'adoption de la motion.

Rapport au Parlement

(6) Le comité d'examen parlementaire dépose ou fait déposer devant chaque chambre du Parlement un rapport des résultats de son examen au moins tous les soixante jours pendant la durée de validité d'une déclaration de situation de crise, et, en outre, dans les cas suivants :

- a)** dans les trois jours de séance qui suivent le dépôt d'une motion demandant l'abrogation d'une déclaration de situation de crise en conformité avec le paragraphe 59(1);
- b)** dans les sept jours de séance qui suivent une proclamation de prorogation d'une situation de crise;
- c)** dans les sept jours de séance qui suivent la cessation d'effet d'une déclaration ou son abrogation par le gouverneur en conseil.

Enquête

Enquête

63 (1) Dans les soixante jours qui suivent la cessation d'effet ou l'abrogation d'une déclaration de situation de crise, le gouverneur en conseil est tenu de faire faire une enquête sur les circonstances qui ont donné lieu à la déclaration et les mesures prises pour faire face à la crise.

order or regulation referred to it pursuant to subsection 61(2) shall be held in private.

Revocation or amendment of order or regulation

(5) If, within thirty days after an order or regulation is referred to the Parliamentary Review Committee pursuant to subsection 61(2), the Committee adopts a motion to the effect that the order or regulation be revoked or amended, the order or regulation is revoked or amended in accordance with the motion, effective on the day specified in the motion, which day may not be earlier than the day on which the motion is adopted.

Report to Parliament

(6) The Parliamentary Review Committee shall report or cause to be reported the results of its review under subsection (1) to each House of Parliament at least once every sixty days while the declaration of emergency is in effect and, in any case,

(a) within three sitting days after a motion for revocation of the declaration is filed under subsection 59(1);

(b) within seven sitting days after a proclamation continuing the declaration is issued; and

(c) within seven sitting days after the expiration of the declaration or the revocation of the declaration by the Governor in Council.

Inquiry

63 (1) The Governor in Council shall, within sixty days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency.

Dépôt devant le Parlement

(2) Le rapport de l'enquête faite en conformité avec le présent article est déposé devant chaque chambre du Parlement dans un délai de trois cent soixante jours suivant la cessation d'effet ou l'abrogation de la déclaration de situation de crise.

Report to Parliament (2) A report of an inquiry held pursuant to this section shall be laid before each House of Parliament within three hundred and sixty days after the expiration or revocation of the declaration of emergency.	
<i>Federal Courts Act, R.S.C., 1985, c. F-7</i> 2 (1) In this Act, ... <i>federal board, commission or other tribunal</i> means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the <u><i>Constitution Act, 1867</i></u>; (<i>office fédéral</i>)	<i>Loi sur les Cours fédérales, L.R.C. (1985), ch. F-7</i> 2 (1) Les définitions qui suivent s'appliquent à la présente loi. ... <i>office fédéral</i> Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prerogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la <u><i>Loi constitutionnelle de 1867</i></u>. (<i>federal board, commission or other tribunal</i>)

CONSTITUTION ACT, 1867, 30 & 31 Victoria, c. 3 (U.K.) Declaration of Executive Power in the Queen 9 The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen. Application of Provisions referring to Governor General 10 The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated. ... Application of Provisions referring to Governor General in Council 13 The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.	LOI CONSTITUTIONNELLE DE 1867, 30 & 31 Victoria, ch. 3 (R.-U.) La Reine est investie du pouvoir exécutif 9 À la Reine continueront d'être et sont par la présente attribués le gouvernement et le pouvoir exécutifs du Canada. Application des dispositions relatives au gouverneur-général 10 Les dispositions de la présente loi relatives au gouverneur général s'étendent et s'appliquent au gouverneur général du Canada, ou à tout autre Chef Exécutif ou Administrateur pour le temps d'alors, administrant le gouvernement du Canada au nom de la Reine, quel que soit le titre sous lequel il puisse être désigné. ... Application des dispositions relatives au gouverneur-général en conseil 13 Les dispositions de la présente loi relatives au gouverneur-général en conseil seront interprétées de manière à s'appliquer au gouverneur-général agissant de l'avis du Conseil Privé de la Reine pour le Canada.
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a **Makanjuola v Commissioner of Police of the Metropolis**

COURT OF APPEAL, CIVIL DIVISION

LORD DONALDSON OF LYMINGTON MR, BINGHAM AND MANN LJJ

8, 16 MARCH 1989

b

Discovery – Privilege – Production contrary to public interest – Class of documents – Statements taken by police in statutory investigation into complaints by member of public – Makers of statements consenting to disclosure – Statements taken from complainant – Whether statements taken by police in investigation of complaint, including complainant's own statement, protected from production or disclosure in civil proceedings – Police Act 1964, s 49.

c

Discovery – Privilege – Production contrary to public interest – Class of documents – Transcript of police disciplinary proceedings – Whether transcript of police disciplinary proceedings protected from production or disclosure in civil proceedings – Police Act 1964, s 49.

d

The plaintiff alleged that she had been assaulted by the second defendant, a police officer, when he visited her while on duty. The plaintiff made a complaint to the police under s 49^a of the Police Act 1964 and also commenced an action against the Commissioner of Police and the second defendant claiming damages. The plaintiff's complaint under s 49 was investigated by a senior officer and a number of statements were taken from witnesses. The complaint was then the subject of disciplinary proceedings before a police disciplinary tribunal and the Police Disciplinary Appeals Tribunal both of which conducted full hearings at which a full shorthand note was taken. The plaintiff applied in the course of her civil action for discovery and production by the commissioner of all the witness statements taken in the course of the s 49 investigation, transcripts of the evidence given at the hearings before the police disciplinary tribunal and the Disciplinary Appeals Tribunal, the formal decisions of the disciplinary tribunal and the Home Secretary's formal decision on the appeal and the discipline book kept by the commissioner relating to the second defendant. The application was resisted on the grounds of public interest immunity. The judge ordered the commissioner to make discovery of the transcript of the evidence given to the police disciplinary tribunal and witness statements of witnesses who consented to the disclosure of their statements. The commissioner appealed, contending that public interest immunity applied to all the documents for which discovery had been ordered, while the plaintiff cross-appealed seeking additional discovery of all witness statements taken in the course of the s 49 inquiry or, alternatively, all statements made by witnesses who gave evidence before the police disciplinary tribunal whether or not the witnesses consented to disclosure.

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Held – Witness statements taken by the police in the course of investigating a complaint under s 49 of the 1964 Act, including the complainant's own statements, were protected from production or disclosure in civil proceedings brought by the complainant against the police on the ground of public interest

a Section 49, so far as material, provided: '(1) Where the chief officer of police for any police area receives a complaint from a member of the public against a member of the police force for that area he shall . . . forthwith record the complaint and cause it to be investigated . . .'

immunity notwithstanding that the makers of the statements might consent to their disclosure, since the immunity could not be displaced by consent to disclosure. Similarly, statements used as evidence in police disciplinary hearings and the transcript of such hearings were protected from production or disclosure in civil proceedings on the ground of public interest immunity. It followed that the commissioner's appeal would be allowed and the plaintiff's cross-appeal dismissed (see p 621 *c d j*, p 622 *c e to h*, p 623 *a c to e* and p 624 *b to d*, post).

Neilson v Laugharne [1981] 1 All ER 829 applied.

Per Lord Donaldson MR and Bingham LJ. Where a litigant asserts that documents are immune from production or disclosure on public interest grounds he is not claiming a right but observing a duty. Public interest immunity is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in the litigation. Accordingly, (i) public interest immunity cannot in any ordinary sense be waived, since, although one can waive rights, one cannot waive duties; (ii) where a litigant holds documents in a class prima facie immune, he should (save perhaps in a very exceptional case) assert that the documents are immune and decline to disclose them, since the ultimate judge of where the balance of public interest lies is not him but the court; and (iii) where a document is, or is held to be, in an immune class, it may not be used for any purpose whatever in the proceedings to which the immunity applies, and certainly cannot (for instance) be used for purposes of cross-examination (see p 621 *e* and p 623 *f to h*, post).

Notes

For investigation of complaints against the police, see 36 *Halsbury's Laws* (4th edn) para 275, and for a case on the subject, see 37(1) *Digest* (Reissue) 333, 2136.

The Police Act 1964, s 49, has been repealed and replaced by the Police and Criminal Evidence Act 1984, s 84 for which see 33 *Halsbury's Statutes* (4th edn) 678.

Cases referred to in judgments

Chaplin v Boys [1969] 2 All ER 1085, sub nom *Boys v Chaplin* [1968] 2 QB 1, [1968] 2 WLR 328, CA; *aff'd* [1969] 2 All ER 1085, [1971] AC 356, [1969] 3 WLR 322, HL.

Hehir v Comr of Police of the Metropolis [1982] 2 All ER 335, [1982] 1 WLR 715, CA.

Marks v Beyfus (1890) 25 QBD 494, CA.

Neilson v Laugharne [1981] 1 All ER 829, [1981] QB 736, [1981] 2 WLR 537, CA.

Peach v Comr of Police of the Metropolis [1986] 2 All ER 129, [1986] 1 QB 1064, [1986] 2 WLR 1080, CA.

Appeal and cross-appeal

The Commissioner of Police of the Metropolis appealed against the order made by Kennedy J on 8 November 1988 on the application of the plaintiff, Olumuyiwa Adebola Makanjuola, requiring the commissioner to serve in the plaintiff's action for assault and intimidation against the commissioner and the second defendant, Sean McCarthy, a police officer in the Metropolitan Police, a supplementary list of documents supported by an affidavit covering (i) the transcript of evidence given to the police disciplinary tribunal hearing disciplinary proceedings against the second defendant, and (ii) witness statements made to police officers investigating a complaint made by the plaintiff that the second defendant had assaulted her, to the disclosure of which the makers of the statements consented. The plaintiff cross-appealed against the judge's refusal to order discovery by the commissioner of all witness statements taken in the course of the police

a investigation into her complaint or, alternatively, all statements made by witnesses who gave evidence before the police disciplinary tribunal whether or not the makers consented to such disclosure. The facts are set out in the judgment of Lord Donaldson MR.

Stuart Sleeman (instructed by *C S Porteous*, Solicitor, Metropolitan Police) for the commissioner.

b *Nicholas Blake* (instructed by *Leighs*) for the plaintiff.

Cur adv vult

16 March 1989. The following judgments were delivered.

c **LORD DONALDSON OF LYMINGTON MR.** In April 1985 the plaintiff alleged to the police that she had been assaulted by the second defendant when he visited her whilst on duty as a police officer in the previous January. This allegation was rightly treated as a complaint under s 49 of the Police Act 1964 and a detective superintendent was appointed to investigate it. The original allegation was recorded in writing and signed by the plaintiff. It preceded the investigation and gave rise to it. However, in the course of the investigation the plaintiff made further statements in writing. So too did her boyfriend, a Mr Atiah. In addition, the police took some 24 other statements from witnesses. Meanwhile, this action was begun.

e At the conclusion of the investigation a report was made to the Director of Public Prosecutions, who decided not to institute criminal proceedings. However, the Police Complaints Authority referred the complaint to a police disciplinary tribunal which conducted a full hearing attended by the second defendant and, for most of the time, by the plaintiff in the exercise of her right under reg 22(2) of the Police (Discipline) Regulations 1985, SI 1985/1520. A full shorthand note of the proceedings was taken and later transcribed. The tribunal found that disciplinary offences had been committed and the second defendant appealed to the Disciplinary Appeals Tribunal. That tribunal heard evidence, and again there was a full shorthand note which has been transcribed.

g The plaintiff then sought discovery from the commissioner. Leaving aside procedural complications, which are not material, the position was reached in which she asked Kennedy J in effect to order discovery and production of: (a) all the witness statements taken in the course of the s 49 investigation; (b) transcripts of the evidence given at the hearings before the police disciplinary tribunal and the Disciplinary Appeals Tribunal; (c) the formal decisions of the police disciplinary tribunal and the Home Secretary's formal decision on the appeal; and (d) the discipline book kept by the commissioner relating to the second defendant.

h This application was resisted upon grounds of public interest immunity.

Kennedy J ordered the commissioner to serve a supplementary list of documents supported by an affidavit covering: (1) the transcript of the evidence given to the police disciplinary tribunal; and (2) witness statements to the disclosure of which the makers of the statements consented.

j The commissioner now appeals claiming that public interest immunity applies to all the documents of which discovery had been ordered and the plaintiff cross-appeals seeking additional discovery of all witness statements taken in the course of the s 49 inquiry or, alternatively, all statements made by witnesses who gave evidence before the police disciplinary tribunal, in each case whether or not the makers consent to such disclosure.

In *Neilson v Laugharne* [1981] 1 All ER 829, [1981] QB 736 the plaintiff sued the defendant chief constable alleging trespass and assault by an officer of his force

and again there was a s 49 investigation. In the action the defendant included in his list of documents all the witness statements taken for the purposes of that investigation, including one by the plaintiff, but objected to producing any of them other than that by the plaintiff. The grounds of objection were legal professional privilege, which this court rejected, and public interest immunity, which this court upheld.

All three members of the court (Lord Denning MR, Oliver and O'Connor LJ) held that upholding a claim to public interest immunity involved a balancing of competing public interests—the need for the fullest possible disclosure in the interests of reaching a just and true decision in the action and, against that, the need for a just and true decision on complaints against police officers, which might be frustrated if witnesses knew that their statements could be given to others and used for a different purpose.

Lord Denning MR expressed the view that, if the plaintiff wished to pursue his claim, he would have to make it out on his own evidence and that of such witnesses as he could find and should not be allowed to indulge in a 'fishing expedition'. He was also concerned at the burden which would be imposed on the police if they had to scrutinise all such statements with a view to asserting a contents privilege. He accordingly held that a class privilege attached (see [1981] 1 All ER 829 at 836, [1981] QB 736 at 748).

Oliver LJ asked himself whether disclosure would adversely affect the attainment of the legislature's purpose as disclosed by s 49 of the 1964 Act. This question he answered in the affirmative, holding that police officers would be deterred from making statements which might found civil actions against them and that relatives, associates and neighbours of the complainant would be likely to be less willing to offer free and truthful co-operation in investigations under the section if their statements were liable to be disclosed in subsequent civil proceedings. Having adverted also to the administrative burden of seeking to assert contents privilege and acknowledging that perhaps even the majority of such statements could be disclosed without adverse effects, he held that the balance of justice favoured the upholding of class privilege (see [1981] 1 All ER 829 at 839–840, [1981] QB 736 at 752–754).

O'Connor LJ gave a concurring judgment (see [1981] 1 All ER 829 at 842–843, [1981] QB 736 at 757–758).

Although it was submitted that the balancing operation had to be conducted in each case and that accordingly we were not bound by *Neilson v Laugharne* [1981] 1 All ER 829, [1981] QB 736, I consider that it at least binds us to start from the position that in a similar case public interest immunity will apply and that any re-balancing should only be undertaken if there are additional factors which need to be taken into account.

In the instant appeal it is contended that the plaintiff's own statements need separate consideration, since in *Neilson v Laugharne* the defendant did not claim public interest immunity for the complainant's own statements and accordingly this court never ruled on that aspect. This is factually correct, but Oliver LJ expressed the view that public interest immunity would apply (see [1981] 1 All ER 829 at 839, [1981] QB 736 at 753). This view was endorsed by Lawton and Brightman LJ in *Hehir v Comr of Police of the Metropolis* [1982] 2 All ER 335 at 340, 341, [1982] 1 WLR 715 at 721, 722. This decision may not be binding upon us, being that of a two-judge court in an interlocutory matter (see *Chaplin v Boys* [1969] 2 All ER 1085, [1968] 2 QB 1), but I think that this court should be as slow to depart from such decisions as the House of Lords is from its decisions and certainly I can see no grounds for doing so in this case. The plaintiff is, of course, entitled to, and has received, a copy of her initial complaint (see reg 9(1) of the Police (Complaints) (General) Regulations 1985, SI 1985/520).

Next, it is contended that it makes all the difference if the makers of the witness statements consent to their disclosure. This issue was raised in *Hehir's* case, where it was the defendant who was seeking to 'waive' public interest immunity. Lawton LJ doubted whether such immunity could be waived, but said that, if it could, the only person who could do so was the maker of the statement. Brightman LJ entertained similar doubts, but floated the idea that, if the maker of the statement wished disclosure to be made, public interest immunity might cease to apply because of the change in circumstances as distinct from being waived.

For my part, I think that the purpose for which public interest immunity applies to witness statements made for the purpose of a s 49 investigation would be frustrated if the makers were liable to be exposed to pressure to consent to disclosure and accordingly I do not regard consent as displacing that immunity.

There remains the question of whether the transcripts of evidence should be disclosed, but I can see no distinction between them and the witness statements. True it is that the complainant will have heard these witnesses give evidence, but from the point of view of the witnesses it is one thing for the complainant to go round alleging that they said something and quite another for her to be able to prove that this is what they in fact said. To this it was objected that the complainant could herself have taken a shorthand note of the evidence, if she had had the necessary skill, and then have transcribed that note. Quite apart from the fact that such a transcript would lack the authority of an official transcript, the chairman of the tribunal could, and in my view should, refuse to allow the complainant to take a shorthand note of the evidence.

I have had the advantage of reading in draft, and agree with, the remarks of Bingham LJ concerning the duty of a party to assert a claim for public interest immunity and the remote possibility that, in the course of proceedings to which that immunity applies, circumstances may arise in which the interests of justice require that it be overridden.

Mr Blake for the plaintiff expressed concern that such a decision would weigh the scales in favour of the defendant and against his client. The defendants, and in particular the commissioner, had, he said, full records of what witnesses were available and what they were likely to say. The plaintiff only had her recollection of the evidence given at the tribunal hearings. There is some force in this, but not much. The plaintiff can give evidence of her recollection of events on the occasion when she says that she was assaulted. She can, if she wishes, call Mr Atiah to give supporting evidence, although we understand that the relationship is now at an end. The only other direct witness appears to have been the second defendant if, which apparently he denies, he was present. The obvious answer to the plaintiff's dilemma is to seek leave to interrogate both defendants. The answers may well be illuminating and indeed transform the outlook for the plaintiff's claim one way or the other. I find it surprising that this line of attack should have been ignored in favour of seeking discovery of material which, save for the second defendant's own statement or statements, is not admissible evidence and would only be disclosable on the basis that it might put the plaintiff on to the track of other admissible evidence.

I would allow the first defendant's appeal and dismiss the plaintiff's cross-appeal.

BINGHAM LJ. In *Neilson v Laugharne* [1981] 1 All ER 829, [1981] QB 736 the defendant chief constable claimed that statements (other than the complainant's) made for purposes of an investigation under s 49 of the Police Act 1964 were immune from production or disclosure because that would be damaging to the

public interest. This was a new claim in the sense that no similar claim had been made (or, if made, contested) for such statements before. a

The claim raised an issue on which this court might have taken either one or other of two views. One view, urged by the plaintiff in that action, was that any statement made for the purposes of a s 49 investigation might be used either in disciplinary proceedings or in a criminal prosecution against a police officer and so its contents might become known to the police officer, other witnesses and members of the public at large in the ordinary course of events. Since these consequences would be foreseeable from the outset such statements could not be regarded as confidential and would not be appropriate subjects for public interest immunity. b

The competing view was that, in the public interest, statements made for purposes of a s 49 investigation should be available for use to further those purposes (whether disciplinary and private, or criminal and public) but no other. c The underlying public interest asserted was (one infers) in the maintenance of an honourable, disciplined, law-abiding and uncorrupt police force. The protection of that public interest required that allegations of improper or criminal conduct by police officers should be investigated and appropriate action taken. To that end it was necessary that members of the public or other police officers should be encouraged to give any relevant information they had to the appropriate authority without fear of harassment, intimidation or use of any statement in any other proceedings. It was therefore desirable in the public interest that statements made to the appropriate authority investigating a complaint against a police officer should not be liable to be produced or disclosed or referred to in any proceedings save disciplinary or criminal proceedings officially brought against the police officer in question. To hold otherwise would frustrate the statutory purpose of an investigation under the Act. d e

This court adopted the latter view, for reasons which appear most plainly in the judgment of Oliver LJ in *Neilson v Laugharne* [1981] 1 All ER 829 at 838-840, [1981] QB 736 at 751-754. The wisdom of that choice has been doubted (see *Hehir v Comr of Police of the Metropolis* [1982] 2 All ER 335 at 338, [1982] 1 WLR 715 at 719 per Lawton LJ) and, where a statement is made for a hybrid purpose, a different rule has been held to apply (see *Peach v Comr of Police of the Metropolis* [1986] 2 All ER 129, [1986] 1 QB 1064), but it seems to me clear that we in this court must apply the ratio of *Neilson's* case to any case not distinguishable from it in principle. f

In the course of the present argument three points of distinction have, I think, been suggested. The first is that in this case, unlike *Neilson v Laugharne*, immunity has been claimed for the complainant's own statements in the investigation. But in *Neilson's* case [1981] 1 All ER 829 at 839, [1981] QB 736 at 753 Oliver LJ expressly considered the position of the complainant and concluded that he could be in no different position from the maker of any other statement. Lawton LJ in *Hehir's* case [1982] 2 All ER 335 at 340, [1982] 1 WLR 715 at 721 thought that that conclusion 'must be right', and Brightman LJ agreed with him (see [1982] 2 All ER 335 at 341, [1982] 1 WLR 715 at 722). I think it is true that the public interest in withholding the complainant's statement from her is weaker than that in withholding the statements of other witnesses, but so also is the countervailing interest in the administration of justice since (a) the complainant cannot, under the ordinary rules, put her statements in evidence anyway; (b) the complainant presumably has some recollection, at least in general terms, of what she said in her statements; and (c) under reg 9(1) of the Police (Complaints) (General) Regulations 1985, SI 1985/520, the complainant is in any event entitled to (and g h i

has in this case received) a copy of her written complaint which triggered the s 49 investigation.

- a** I find no ground for distinguishing *Neilson v Laugharne* here.

The second suggested distinction is that, whereas in *Neilson v Laugharne* there had been no disciplinary hearing and no criminal prosecution, here there have been two disciplinary hearings at each of which the complainant has attended, given evidence, been cross-examined and heard the evidence of other witnesses.

- b** Accordingly, it is said, the statements have lost the confidentiality they had once had and there is no surviving public interest to protect. I do not think this is a valid point of distinction either. The public interest which the court upheld in *Neilson's* case was not based on confidentiality (see [1981] 1 All ER 829 at 834-835, 838, [1981] QB 736 at 747, 751, per Lord Denning MR and Oliver LJ), but on the need to reassure informants that statements would not be usable for any but s 49 purposes. This need remains as strong after disciplinary proceedings as before, perhaps even stronger. Statements do not in my view lose the immunity upheld in *Neilson's* case simply because proceedings contemplated when the statements were made in fact occur.

- c** The third suggested distinction is that here there is a transcript, which the plaintiff wishes to see. In *Neilson's* case there was of course no transcript because there had been no proceedings. If, however, the public interest requires that statements be immune from production and remain so although they have given rise to proceedings, I can see no basis for treating the transcript of those proceedings differently since it, no less than the statements, could be used for purposes entirely extraneous to s 49 and detrimental to witnesses and informants. Consistency in my view demands that it be treated the same, and so be withheld.

On these grounds I would allow the first defendant's appeal and dismiss the plaintiff's cross-appeal.

- d** I would, however, add this. Where a litigant asserts that documents are immune from production or disclosure on public interest grounds he is not (if the claim is well founded) claiming a right but observing a duty. Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in the litigation. This does not mean that in any case where a party holds a document in a class prima facie immune he is bound to persist in an assertion of immunity even where it is held that, on any weighing of the public interest, in withholding the document against the public interest in disclosure for the purpose of furthering the administration of justice, there is a clear balance in favour of the latter. But it does, I think, mean:
- e** (1) that public interest immunity cannot in any ordinary sense be waived, since, although one can waive rights, one cannot waive duties; (2) that, where a litigant holds documents in a class prima facie immune, he should (save perhaps in a very exceptional case) assert that the documents are immune and decline to disclose them, since the ultimate judge of where the balance of public interest lies is not him but the court; and (3) that, where a document is, or is held to be, in an immune class, it may not be used for any purpose whatever in the proceedings to which the immunity applies, and certainly cannot (for instance) be used for the purposes of cross-examination.

- f** This is not to say that circumstances may not arise in the course of a trial which may lead a judge properly to rule that a document previously immune in the public interest should in the public interest be disclosed. Even the name of an informer may be revealed if it is necessary to establish a prisoner's innocence: *Marks v Beyfus* (1890) 25 QBD 494 at 498 per Lord Esher MR. But such occasions

will be exceptional and the fluctuating fortunes of parties in litigious combat will rarely justify a judge in disturbing an immunity firmly rooted in the public **a** interest.

MANN LJ. In company with Lord Donaldson MR and Bingham LJ, I regard this case as being effectively determined by the decision of the court in *Neilson v Laugharne* [1981] 1 All ER 829, [1981] QB 736. That was as it seems to me **b** a decision taken on public policy grounds.

The case is conclusive that the statements taken for the purpose of carrying out the investigation of a complaint under s 49 of the Police Act 1964 are not to be given on request. It was suggested before us that the position may be different in regard to the statement of the person making the request. I do not agree and indeed the matter is covered by the observations of Oliver LJ in *Neilson v Laugharne* [1981] 1 All ER 829 at 839, [1981] QB 736 at 753. If statements are not to be **c** obtained then it must follow that a transcript of the disciplinary proceedings cannot be obtained. To obtain it would be an act of circumvention.

It was suggested that the policy which prevented revelation was exhausted once an inquiry was concluded. I would reject this submission. The policy consideration applies with equal weight both before and after an inquiry. People may well be **d** inhibited if they were conscious that a statement and the transcript would be disclosed after the conclusion of the proceedings.

I would allow the first defendant's appeal and dismiss the plaintiff's cross-appeal.

*First defendant's appeal allowed. Plaintiff's cross-appeal dismissed. Leave to appeal to **e** the House of Lords refused.*

Mary Rose Plummer Barrister.

Halford v Sharples and others **f**

COURT OF APPEAL, CIVIL DIVISION

SIR STEPHEN BROWN P, RALPH GIBSON AND BUTLER-SLOSS LJ

4, 5, 9, 17 MARCH 1992 **g**

*Discovery – Privilege – Production contrary to public interest – Class of documents – Police complaints and disciplinary files – Woman police officer in charge of complaints and disciplinary files making complaint of sex discrimination – Applicant seeking discovery of complaints and disciplinary files – Whether police complaints and disciplinary files protected from production or disclosure in civil proceedings by public interest **h** immunity.*

The applicant, a woman assistant chief constable, made a complaint of unlawful sex discrimination to an industrial tribunal against the respondents, the Home Secretary, the Inspector of Constabulary, a police authority which had failed to interview her for the post of deputy chief constable, and the chief constable of her **j** own police force, who had refused to recommend her for promotion because of her alleged defects of character and judgment. The grounds of the complaint were that the respondents had discriminated against her by persistently refusing to support or approve her applications for vacant deputy chief constable posts and that she had been treated less favourably on the ground of her sex than male

Nicholas d'Ombrain

Cabinet secrecy

Abstract: Cabinet secrecy is a cornerstone of the constitution of the Westminster system of government and is safeguarded by convention, common law and statute law in leading Westminster regimes. Secrecy of cabinet proceedings is very much part of the efficient constitution, but the protections afforded by convention and law are neither well understood nor particularly popular. This article examines the convention and how it differs from the common law and statute law treatments of cabinet secrecy. It considers the essential requirements for cabinet secrecy: collective decision-making; the protection of the views and opinions of ministers; and several related problems of the constitution, including the role of the cabinet as the informal executive, the use of the cabinet as an administrative coordinating mechanism, and – unique to Canada – the use of statute law to remove the courts from their traditional role of determining the balance between individual rights and those of the state. Cabinet secrecy is essential to a system of government where responsible ministers collectively decide the government's policy, but in order to play a proper role in our affairs the convention on secrecy needs to be constitutionally validated by the articulation of its purpose and scope.

Sommaire : Le secret ministériel est une pierre d'angle de la constitution de Westminster, protégé par la convention constitutionnelle, la *common law* et la législation dans les principaux pays du système de Westminster. Le secret ministériel fait intimement partie de la constitution efficace, mais les protections procurées par la convention et la Loi ne sont ni bien comprises ni particulièrement bien vues. Cet article examine la convention et comment elle se démarque de la façon dont la *common law* et le droit législatif interprètent le secret ministériel. Il examine les conditions essentielles du secret ministériel : la prise de décision collective et la protection des points de vue et opinions des ministres. Il examine également plusieurs problèmes connexes de la constitution, y compris le rôle du cabinet comme le pouvoir exécutif officieux; le cabinet comme un mécanisme de coordination administrative et – propre au Canada

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– le recours au droit législatif pour enlever aux tribunaux leur rôle traditionnel qui est de déterminer l'équilibre entre les droits individuels et ceux de l'État. Le secret ministériel est essentiel à un système de gouvernement dans lequel les ministres responsables décident collectivement de la politique du gouvernement, mais pour qu'elle puisse jouer un rôle judicieux dans nos affaires, la convention sur le secret ministériel doit être validée dans la constitution en y stipulant son but et son champ d'application.

Secrecy of cabinet proceedings is one of the cornerstones of the Westminster system of government. The secrecy is protected by convention, the common law and – in differing degrees – statute law in the principal countries with Westminster systems, notably the United Kingdom, Canada and Australia. From time to time, the convention of cabinet secrecy convention is questioned, sometimes in principle but more often for the way in which it is applied. On the one hand, the rule that ministers are entitled to express their views on the government's business in confidence appears to be generally accepted.¹ On the other hand, in an age of "open government," there is a good deal of criticism about anything that is closed. It is probably fair to say that although the convention may be practised and generally accepted, there is not much appetite to defend it.

This article explains the essence of the cabinet secrecy convention. It examines the scope of the convention, explains its place in the theory of the constitution and outlines the conditions necessary for its appropriate application. The convention was established to protect the process of decision-making, which is quintessentially political in a system of government built on the collective responsibility of ministers to the House of Commons. It takes as given that cabinet government is working constitutionally – that ministers are making decisions collectively – and it protects the views and opinions of ministers, not the substance of the matters deliberated or decided. Some may have doubts that collective decision-making is still the predominant characteristic at either level of government in Canada, and others observe that the laws related to the secrecy convention protect far more than the views and opinions of ministers. To be sure, if collective decision-making has been set aside by a prime ministerial *imperium*, the essential precondition for the operation of the secrecy convention will have become similarly obsolete. But if the problem is that the convention has been applied somewhat too broadly, that can be remedied. In short, provided we are being governed constitutionally – that is, by ministers deciding the government's policy collectively – cabinet secrecy remains essential to our constitution. However, remaining essential – a grudging acceptance of a necessary evil – is not good enough if the convention is to continue to play its proper role in our affairs. The purpose and scope of the convention needs to be articulated and its constitutionality validated, and that is the subject of this article.

Cabinet secrecy has undergone a notable evolution in Canada over the past fifty years. Two developments are of particular note: first, there has been a significant expansion of the matters to which protection is afforded; second, the courts in Canada have been removed from any role in determining the validity of claims of cabinet secrecy at the federal level, and there is no duty in the courts or elsewhere to weigh the competing claims of public and private interests in the disclosure of cabinet secrets. The second of these developments is clearly the consequence of Parliament's decisions in the 1970s and 1980s to use its authority to replace the common law functions of the courts in respect of cabinet secrecy. The expansion of the protection is also at least in part the consequence of the decision to legislate the scope of cabinet secrecy beginning in 1970.

The political nature of the cabinet, and the informal nature of its "decision-making," are the qualities that justify its secrecy

Cabinet secrecy is a vibrant part of the Canadian – indeed the Westminster – constitution. But the scope of the convention, particularly its political character, is not well understood and this at times produces bizarre results. Some practitioners are carelessly undermining the convention. It is, for example, becoming common for new provincial premiers to declare such innovations as open cabinet meetings or – most recently – to appoint every member of caucus to a cabinet committee.² Nor is the lack of appreciation limited to first ministers: some judges seem to have considerable difficulty in grasping the difference between a cabinet secret and a substantive secret, and there is vacillation about the prospect of upholding cabinet secrecy against the rights of an accused.

In addition to profound questions about the collective nature of decision-making in the modern cabinet and the role of the courts in balancing public and private interests, cabinet secrecy is challenged by the need to communicate that the cabinet is only the informal executive, and by the implications of the use of the cabinet as an administrative coordinating mechanism. Taken together, these may appropriately be described as problems of the constitution, forming the strands of a Gordian knot around the cabinet that focuses attention on the legitimacy of the secrecy convention.

Cabinet secrecy is widely assumed to be akin to executive privilege, shielding all that is internal to the cabinet. The cabinet secrecy convention does not protect the substantive secrets of the cabinet; rather, it protects the processes whereby ministers arrive at decisions. That is all it protects. The common law and related statutory provisions may provide greater

protection, but to the extent that is so, they exceed the scope of the secrecy convention.

The convention of cabinet secrecy protects the views and opinions of ministers and the process of decision-making from disclosure to political opponents, who could exploit such information to undermine the unity of the government and hence its ability to maintain the confidence of the House of Commons. Closely related is the candour argument, which claims that failure to protect the views and opinions of ministers would have a chilling effect on their willingness to speak their minds freely as required by their oaths as privy councillors.³

A common understanding of the nature of the cabinet and its role in the constitution is helpful to a discussion of cabinet secrecy. Walter Bagehot famously referred to the cabinet as the "efficient" part of Westminster-style constitutions, the part that "in fact, works and rules."⁴ Indeed, the efficient or practical worth of the cabinet remains its key characteristic. Yet, as this celebrated editor of *The Economist* pointed out, "The most curious point about the cabinet is that so very little is known about it."⁵ Although there is a good deal more openness about the organization of the cabinet today,⁶ its proceedings remain secret – if not as secret – as they were when Bagehot made this observation about the British cabinet in the year of the Canadian confederation.⁷

The convention of cabinet secrecy builds on the core elements of the parliamentary constitution. Ministers are collectively responsible to the House of Commons, a democratic, representative and therefore political institution, for the actions of the government. Those actions fall under the authority of ministers individually or the formal executive (the Crown) on their individual advice. Ministers must, however, ensure that individual actions have the support of their colleagues in the ministry. This support is fundamentally political because of the political character of the House of Commons. In order for ministers to collectively agree to support the actions of ministers individually, they require a political process whereby proposals can be advanced, compromises discussed and final decisions arrived at. This is the cabinet decision-making process. For this process to work, ministers must be able to speak frankly without fear that divergent views or disagreements may become known and exploited through the political process, and thus potentially undermine parliamentary confidence in the ministry.⁸

The integrity of the cabinet secrecy convention depends on the constitutional position of the cabinet. The informal and political character of cabinet "decision-making" not only makes secrecy essential to its proceedings but justifiable in an open and democratic society. In the early part of the twentieth century, Sir William Anson, founder of Oxford's law school, MP for the university from 1899 to 1914, and all-round constitutional icon, noted that "[t]he Cabinet shapes policy and settles what shall be done in important matters ... but it is not therefore the executive."⁹ Later, Sir Ivor Jennings, a late-

comer to the subject but nonetheless professor of constitutional law at Cambridge at the time of his death in 1965, explained that "[n]either the Cabinet nor the prime minister, as such, claims to exercise any powers conferred by law. They take the decisions, but the acts which have legal effect are taken by others – the Queen, the Privy Council, a minister, a statutory commission, and the like."¹⁰ Canadian authorities have made the same point: "The prime minister and cabinet ... exercise no formal powers; they decide rather how some regularly constituted authority – the Governor General, the Governor-in-Council, a particular minister – is to discharge functions with which that authority is legally entrusted and concerning which it will, as a matter of custom and convenience, accept direction from the prime minister and the cabinet."¹¹ Such is the informal place of the cabinet in constitutional law, rooted in its political function of establishing and maintaining collective responsibility. The political nature of the cabinet, and the informal nature of its "decision-making," are the qualities that justify its secrecy.

It is important to distinguish cabinet secrecy from other forms of secrecy concerning the business of government. The cabinet secret is concerned with the expression of views and opinions of ministers exchanged in the discussion of substantive matters that become the objects of cabinet decisions or other actions of the government. The operation of the convention on access to the papers of former ministries demonstrates the difference between a cabinet secret and other government secrets. Among its provisions, the convention authorizes the secretary to the cabinet (as custodian of the papers of former ministries) to "inform the incoming government, or any future government, of the decision that was reached in order that government business may be carried on with maximum efficiency, ... without revealing the opinions of Ministers ... nor any differences of opinion between Ministers."¹² Thus, the secrecy attaches to the process whereby decisions are arrived at. A different, or substantive, secrecy attaches to particular types of government information and decisions that may merit secrecy because disclosure would cause harm to particular public interests, such as national security, defence and international affairs.¹³

The significance of secrecy is illustrated by the strict rules imposed by prime ministers against the taking of notes in cabinet, other than by official note-takers in the cabinet secretariat.¹⁴ The guidance provided to Canadian and British ministers by the Privy Council Office and the Cabinet Office, respectively, has stressed that the establishment and maintenance of collective responsibility requires that "Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached."¹⁵ "Confidentiality ensures that Ministers can frankly express their views before a final decision is made."¹⁶

During the 1970s and 1980s, successive British secretaries of the cabinet,

Sir John Hunt and Sir Robert Armstrong, provided authoritative interpretations of the convention of cabinet secrecy. Hunt captured the essence of the doctrine when he summed up his exposition of the secrecy convention, noting that "Ministers will not feel free frankly to discuss and to surrender their personal and departmental preferences to the achievement of a common view, nor can they be expected to abide by a common decision, if they know that the stand they have taken and the points they have surrendered will sooner rather than later become public knowledge."¹⁷

The convention on cabinet secrecy may be seen at work on a daily basis. Ministers do not disclose the content of cabinet discussions, although there is the exception of the deliberate or self-exculpatory leak, the latter being more prevalent in the United Kingdom than in Canada.¹⁸ Usually, they do not disclose when matters are going to be discussed. Prime ministers regularly remind ministers of the significance of cabinet secrecy, both in mandate letters and from time to time under the cabinet agenda item of "general discussion."¹⁹ Cabinet minutes, which disclose opinions and may reveal differences between ministers, receive special protection, more than is afforded to other cabinet papers. The convention also operates when a minister resigns because of a difference with his or her colleagues in the cabinet. In such circumstances, it is customary for the prime minister to permit the outgoing minister to explain the nature of the disagreement. It is also seen in the rules attaching to the vetting of ministerial memoirs.²⁰

The Xerox machine and the Trudeau government greatly changed cabinet's papers

The political character of protection afforded by cabinet secrecy is further illustrated through the operation of the convention on access to the papers of former ministries, referred to earlier. The essence of the convention is that "[c]urrent Ministers may not see the Cabinet papers of former Ministers of a different political party."²¹ The convention is of relatively recent origin but is well established, being designed explicitly to prevent the political exploitation of the views and opinions of ministers.

There is not much scholarly comment on the convention in part because it dates from the mid-twentieth century.²² However, it is mentioned by Jennings, who, in the context of the imminent postwar change of the British government in 1945, noted that "the ministers of one Government are not entitled to examine the Cabinet documents of their predecessors."²³ The political character of the convention has been recognized by the courts in the United Kingdom and Canada: "[T]here is a long-standing and important constitutional rule that ministers of a government formed by one party are

not allowed to see the documents of a former government" because such papers contain "privately expressed opinions of ministers in a previous government."²⁴ The convention is not only well established in Canada and in the United Kingdom but it has been carefully recorded and indeed elaborated with each change of government in Canada, particularly between opposing parties, since 1957. This was well captured by the clerk of the Privy Council and secretary to the cabinet in his memorandum to Prime Minister St. Laurent at the time of his defeat by Mr. Diefenbaker. Referring to the need to preserve for posterity cabinet and cabinet committee conclusions, minutes and documents, Robert Bryce explained, "In order that these papers may be useful, they have to be written frankly and confidentially, frequently revealing differences of view between Ministers or opinions of Ministers which would not be put on paper if it were felt they would ultimately fall into the hands of members of another political party."²⁵

Significant changes in the common law during the 1960s precipitated the government's decision to provide statutory protection for cabinet secrecy

Since that straightforward declaration of principle, practitioners have tended to expand and make more complex the scope of the convention, whereas the courts have tended in the opposite direction, seeking to narrow and clarify the scope. In the common law cases, there have been frequent references to the certain classes of papers that on their face clearly merit protection, the most frequently mentioned being cabinet minutes.²⁶ Originally, the courts provided almost unlimited protection to any information for which Crown privilege was claimed. But, more recently, both in Canada and the United Kingdom, the courts have expressed doubt about claims of secrecy unless disclosure can be demonstrated to be against the public interest. Parliaments have taken divergent courses. In Australia and later the United Kingdom, the practice has been to define the convention in legislation using the simplest of substantive terminology – "disclosure of deliberations or decisions of the Cabinet" (Australia); "proceedings of the Cabinet" and "the maintenance of the convention of the collective responsibility of Ministers" (United Kingdom). In Canada, Parliament began with a brief but obscure reference to the convention that provided no form of definition. Later, this was elaborated to provide a generally non-substantive definition made up of the records – agendas, memoranda, reports, minutes, decisions, briefing notes – wherein "confidences of the Queen's Privy Council" were likely to be found. The Canadian endeavour to capture in statute the secrecy convention began in 1970.

Indeed, 1970 was a seminal year for cabinet secrecy in Canada. It marked the beginning of an ever-growing bureaucratization of the cabinet process, as well as the suppression of the common law protection afforded cabinet secrets by a more certain form of legislated privilege that ensured control by the executive rather than by the courts. These two measures over time had the effect of expanding significantly the scope of cabinet secrecy, embracing far more than the views and opinions of ministers.

The changes in cabinet process introduced by Prime Minister Trudeau built on the reality that the cabinet is more than a political forum, seminal though that function may be. The cabinet also fulfils administrative functions: it is the forum for the approval of the detailed arrangements for the implementation of the government's policies and programs.²⁷ A cabinet decision is a vital piece of administrative paper, detailing the authorities that have been agreed to, the monies that are to be spent, and the administrative arrangements that are necessary to move from policy to legislation to program design and ultimately program delivery. This administrative function may be detected in the cabinets of the nineteenth century, when the only record of cabinet proceedings was the prime minister's letter to the sovereign (in Canada, to the governor general), but it became much more central when twentieth-century cabinets took on the services of organized secretariats.

The advent of the cabinet secretariat changed much in the day-to-day operations of the cabinet. The introduction of civil servants to the cabinet room, and with them their records, changed the way in which government worked. The cabinet remained at core a political forum for the hammering out of agreed policies, but the making of policy was now recorded in progressively greater detail. A system of records grew up in the 1940s and had by the 1950s assumed more or less the skeleton of what we recognize today as the cabinet paper system: a memorandum from the minister outlining a proposed initiative; a cabinet committee agenda, minutes and report on the discussion among ministers; and minutes of the cabinet and a record of the decision agreed to. Civil servants from departments began to attend cabinet committees, although it was rare for other than the cabinet secretariat staff to be present at cabinet meetings.

Although these were significant changes in cabinet procedure, the volume of typewritten and carbon copy (later mimeographed) papers was moderate. Ministers generally managed to make their case in two or three pages, and the cabinet conclusions (a combination of minutes and decisions) were generally no more than a half-dozen double-spaced, legal-size pages. And, as noted, when the government changed in 1957, the concern was to protect the views and opinions of ministers from political exploitation, not the cabinet paper system as such, and in particular not the decisions that had become so necessary for the proper and continuous functioning of government.

The Xerox machine and the Trudeau government greatly changed cabinet's papers. Beginning with Trudeau's "cabinet planning system," the papers of the cabinet took on increasingly impressive physical proportions, and it was widely assumed that ministers applying themselves to their duties did not have the time or need to read what had become papers written by civil servants for other civil servants to read, negotiate over, and implement in accordance with whatever political direction they received from ministers. This is not to say, however, that much of the content of the cabinet's papers does not qualify for protection under the secrecy convention. The federal cabinet makes in the order of 200 to 300 substantive decisions a year – which may run anywhere from three to 300 pages – on the basis of memoranda from ministers.²⁸ While these may disclose little in the way of ministerial opinion other than the sponsoring minister's recommendation, other cabinet papers, such as agenda, committee reports and some decisions disclose the process whereby proposals are debated and decisions reached. Cabinet and committee minutes provide insight into the various options considered and positions taken amid the twists and turns leading to a decision. Briefing notes for the prime minister and committee chairman will routinely disclose differences between ministers. The Privy Council Office noted in the 1970s that the cabinet's political and administrative functions have become "enmeshed ... as a consequence of the growing complexity of the cabinet's business and the elaboration of support services provided by its secretariat."²⁹ The development of this elaborate, structured and technical approach to cabinet decision-making gathered steam during the early 1970s coincident with the passage into statute law of the secrecy convention.

Significant changes in the common law during the 1960s precipitated the government's decision to provide statutory protection for cabinet secrecy. In the late nineteenth century, it was commonplace for ministers and other office-holders to claim protection from discovery in a court of law of almost any government document. The courts sustained these claims, establishing over time a rule of evidence known as "Crown privilege." For many years, Crown privilege was routinely claimed in respect of what were then the principal activities of the state: the maintenance of law and order and defence of the realm, including its diplomatic relations.³⁰ Indeed, cases of Crown privilege do not explicitly mention cabinet secrecy until well into the twentieth century, and then only by way of illustrating a class of papers that self-evidently should not be subject to production. Crown privilege "provides that evidence that is relevant and otherwise admissible must be excluded if its admission would be injurious to the public interest."³¹

As is the nature of the common law, the rules of evidence evolve with successive judgements. The nineteenth-century view was that "it is the duty of the Courts to refuse discovery of documents which are ascertained to be state papers and as such privileged from inspection."³² But the common law on

this matter changed significantly between the 1940s and the 1970s. In the earlier period, the courts did not think it appropriate to substitute their own opinion for that of a minister or other officer of state, even though the information in question was nothing so elevated as that thought to be found in cabinet papers.³³ The high tide of Crown privilege was achieved in the judgment in 1942 in the now-celebrated case of *Duncan v. Cammell Laird*. The documents in this case were technical in nature, involving a marine disaster (the sinking of the submarine *Thetis* on its trials in the summer of 1939). In the course of his speech on behalf of his fellow law lords, Viscount Simon took the position that "[w]hen the Crown ... is a party to a suit, it cannot be required to give discovery at all. No special ground of objection is needed. The common law principle is well established."³⁴ Even so, although Simon asserted the duty of the court to uphold claims of Crown privilege, he made clear that the exercise of that duty lay with the court, not the executive.³⁵

In 1953, the Supreme Court of Canada, rejected the Crown's assertion of privilege similar to that set out in the *Duncan* case.³⁶ This decision began to restore to the common law the principle that the courts have a duty to weigh competing claims and that justice could not be served by blind acceptance of claims of privilege by one party – the Crown. It was not, however, until the 1960s under the leadership of Lord Denning that the common law was brought fully into accord with the rules of natural justice.³⁷ In the first of a series of cases, Denning challenged the House of Lords' decision in the *Duncan* case, asserting, "After all, it is the judges who are the guardians of justice in this land: and if they are to fulfil their trust, they must be able to call on the Minister to put forward his reasons so as to see if they outweigh the interests of justice."³⁸ Later in 1964, Canada's Supreme Court heard an appeal that allowed it to reinforce its own decision of 1953 and the more recent declaration by Lord Denning of the duty of the courts to consider the public interest in respect of claims of Crown privilege.³⁹ It took another four years for the House of Lords formally to overturn Lord Simon's statement of the law on Crown privilege in the *Duncan* case. In *Conway v. Rimmer*, the law lords reasserted the duty of the court to weigh the competing claims and, if necessary, to examine documents and even to order production.⁴⁰

The *Conway* case ended the traditional common law treatment of Crown privilege. Indeed, within a few years, the very term had been expunged from the common law, its echo of divine-right splendour being replaced with the utilitarian phrase "public interest immunity."⁴¹ The decision of the House of Lords had an even more far-reaching consequence in Canada, where the federal government decided to supersede this unwelcome development in the common law by enshrining its understanding of Crown privilege in statute law.

The government incorporated the relevant provision in the new Federal Court Act, which was brought forward in 1970 as part of a general reform of

federal courts that replaced the Exchequer Court of Canada with the Federal Court of Canada.⁴² The bill was considered by Parliament during the "October Crisis" in the autumn of 1970. In the course of debate, the minister of justice, John Turner, referred to the *Conway* case and the reversal of the former view that all claims of privilege by the executive should be determinative without examination by the court.⁴³ He also suggested that the application of an absolute privilege for international relations, defence and security, federal-provincial relations and cabinet secrecy was reasonable.⁴⁴ In doing so, perhaps the minister had in mind the comments of the House of Lords that papers in such categories would no doubt automatically be exempted from production. He did not, however, point out that the House of Lords had explicitly reserved to the courts the right and duty to make this decision.

Section 41 of the new act set out the statutory regime to govern Crown privilege as it related to the federal government at all levels of the judicial system. Under the new provision, the courts were to continue to have authority to examine and order production of documents for which privilege was claimed by ministers except in certain matters, including cabinet secrecy, referred to for the first time as "a confidence of the Queen's Privy Council for Canada."⁴⁵ This term was not defined, but between 1976 and 1983 events led the government to identify the types of documents where such "confidences" were likely to be found. This began when the secretary of state issued a green paper on access to government documents in June 1977.⁴⁶ Although ultimately the green paper's proposals were to lead to legislation that elaborated on the phrase "Privy Council confidence," the next step in the evolution of the statute law concerning cabinet confidentiality was sparked by a public inquiry that sat between 1977 and 1981.

[S]tatute law is a clumsy and seldom successful way of capturing constitutional convention and practice

The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (the McDonald Commission) into "the extent and prevalence of investigative practices or other activities involving members of the R.C.M.P. that are not authorized or provided for by law"⁴⁷ became the first in Canada's history to be given extensive access to cabinet papers and other documents relating to the making of policy at the highest levels. Mindful of the precedent set by providing access to such documents,⁴⁸ the government devised a process whereby papers of this character could be formally conveyed to the commission for its use in hearings. For convenience's sake, the government referred to these documents as "government documents," and its counsel described them for the commission's benefit in

the form of a list of various types of documents including "Cabinet agendas, memoranda, minutes and decisions."⁴⁹ Unrecognized at the time, this list constituted the first attempt to provide a definition of the phrase "confidence of the Queen's Privy Council for Canada." The need for the list became even greater in the summer of 1979, when the Liberal government was replaced by Prime Minister Clark's minority administration. As was by now normal and conventionally established, Prime Minister Trudeau's papers were placed in the custodial care of a senior official (exceptionally the secretary to the cabinet for federal provincial relations, R. Gordon Robertson), and the conventional practice was observed that these papers would not be accessible to Clark unless Trudeau first gave his permission. This arrangement presented a novel problem for dealing with the commission's demands for papers. Nonetheless, a system was devised, building on the now-customary exchange of letters concerning the convention on access to the papers of the outgoing ministry.⁵⁰ Thus, by 1980, principally because of the McDonald Commission, the term "confidence of the Queen's Privy Council for Canada" was beginning to take on a particular meaning, defined principally by the types of documents where "confidences" were likely to be found. These developments coincided with the growing pressure in Parliament and elsewhere to provide a statutory right to "freedom of information," which was to lead in time to a further elaboration of the statute law regarding cabinet secrecy.

In July 1982, royal assent was given to legislation to govern the right of public access to government documents. This initiative had been under more or less active consideration since 1976. The many exemptions in the new law were defined in considerable detail, and this applied no less to those concerning federal-provincial relations, international relations, and defence and security. No longer was information of this type protected by the hitherto conclusive affidavit procedure set out in Section 41(2) of the Federal Court Act. Henceforth, it would be necessary for the heads of government institutions to explain and, if need be, defend decisions to claim exemptions. This need to demonstrate injury explained the extensive definitions – and defences – set out in the new legislation. Figuratively speaking, all that remained of Section 41 of the Federal Court Act were "confidences of the Queen's Privy Council for Canada." The new legislation did not provide an exemption for this remaining class of documents because it expressly did not apply to them, and, for greater certainty, the act provided a list of the sorts of document where these confidences were likely to be found.⁵¹ The list reflected the then current system of cabinet papers administered by the Privy Council Office, which despite the recent innovation of the "discussion paper" had remained largely unaltered since the 1940s. The list also echoed its origins in the description of "government documents" provided to the McDonald Commission and the detailed description of cabinet papers that

first appeared in the 1979 exchange between incoming and outgoing prime ministers dealing with the convention on access to papers of former administrations.

As a consequence of the provisions of the Access to Information Act, Section 41 of the Federal Court Act was repealed and new provisions added to the Canada Evidence Act. These authorize a superior court to examine and in the public interest to order production of all documents in respect of which an objection to disclosure is made except for claims of injury to international relations, national defence or security, and confidences of the privy council. Claims respecting international relations, national defence or security may be determined under the authority of the chief justice of the Federal Court.⁵² As for confidences, the amendments provided absolute immunity for claims of cabinet secrecy made by a minister or by the clerk of the privy council and replicates the wording respecting "a confidence of the Queen's Privy Council for Canada" found in the Access to Information Act cited above.

The new definition reflected the then current composition of the cabinet paper system: it made no attempt to provide a substantive definition (such as the views and opinions of ministers) but rather declared a confidence to be anything that resided in particular classes of papers used by the cabinet in the transactions of its business – agendas, memoranda and so on.

"[W]hat is so important about secret government that it must be protected even at the expense of injustice in our courts?"

The effect of the new definitions in the two acts was far-reaching. With detailed classes of documents statutorily enacted, the legal response was to claim privilege (now restyled by the courts as "public interest immunity") for any paper that fell into one of these classes, regardless of content. An industry has been created in Ottawa to review and claim immunity for these classes deemed by Parliament to constitute a confidence of the privy council. The problem today is that these perverse consequences have come to be seen as the norm by many of those engaged in protecting the secrets of the cabinet. Detailed statute law is a clumsy and seldom successful way of capturing constitutional convention and practice. There has been no exercise of discretion: all records covered by the acts are routinely withheld. This does not mean that the privilege is being claimed inappropriately, still less carelessly or mendaciously. It means simply that the law is being applied as Parliament prescribed.

The United Kingdom and Australia have also experimented with statutory provisions that attempt to capture the cabinet secrecy convention.

Although Canada alone has a statutory provision governing protection of cabinet secrets in courts of general jurisdiction, all three countries have statutes that govern the treatment of cabinet secrets by parliamentary auditors, including auditors general, information commissioners and ombudsmen. As discussed, the practice in Canada has generally been to deny access to "confidences of the Queen's Privy Council" and to describe documents where such are to be found. In Australia and the United Kingdom, the tendency is towards providing a brief substantive definition of the information that is entitled to protection, on the lines of "the deliberations of the cabinet" and, most recently in the United Kingdom, "the maintenance of collective responsibility."

Australia has had ombudsman's legislation since 1976. The act provides exemptions for defence, security, international relations, and Commonwealth-state relations, as well as matters related to the "deliberations or decisions" of the cabinet and the "deliberations or advice" of the executive council.⁵³ The Administrative Decisions (Judicial Review) Act, 1977 includes a certificate procedure to protect documents that would "involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet to administrative tribunals."⁵⁴ Note, however, that the act does not attempt to displace the common law rules on privilege/immunity in the event the matter goes to the appropriate court.⁵⁵ The Administrative Appeals Tribunal Act, 1975 contains a similar certificate procedure covering the usual categories of papers (defence, security, international relations) including those that "would involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet."⁵⁶ It differs, however, in that the documents may be disclosed to the tribunal, which is under obligation "to ensure that the information or the matter contained in the document is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the Tribunal."⁵⁷

Australia's Freedom of Information Act, 1982 contains an absolute exemption for cabinet documents when certified by the secretary to the department of the prime minister and cabinet. The exemption applies to documents and official records of the cabinet and "a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet."⁵⁸ A review of the act by the Australian Law Reform Commission concluded that the finality of the government's certificate should continue: "Given the fundamental role of the Cabinet in the Westminster system of government it is appropriate that the ultimate responsibility for the exemption of Cabinet documents lies with Ministers."⁵⁹ On the other hand, it is interesting that Australia's Auditor General Act does not restrict the auditor general's access to cabinet information, but there is a certificate procedure to prevent publication of certain matters including "disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet."⁶⁰

The United Kingdom has generally avoided providing specific statutory protection for cabinet secrets from parliamentary auditors, relying instead on general understandings of what is and is not accessible to auditors. But there are exceptions. The ombudsman, established under the Parliamentary Commissioner Act, 1967, has statutory access to "any relevant document other than one relating to the proceedings of the Cabinet and its committees."⁶¹ Most interestingly, in 2000, the British Parliament passed the Freedom of Information Act, 2000, to govern a new regime for access to information, including the creation of an information commissioner. The act provides protection for cabinet secrets. It does this by protecting "any communications between Ministers of the Crown ... and includes, in particular, proceedings of the Cabinet or any committee of the Cabinet," as well as information that "would, or would be likely to, prejudice ... the maintenance of the convention of the collective responsibility of Ministers of the Crown, or ... the free and frank provision of advice, or ... the free and frank exchange of views for the purposes of deliberation."⁶²

But these British and Australian statutes are of limited application, and, as feared by those who framed Canada's initiative to freeze the law on cabinet secrecy, the common law has continued to evolve both in the United Kingdom and Australia, as it has in respect of provincial jurisdiction in Canada. During the 1970s, cases in the United Kingdom and Australia introduced new strands of argument, including the idea that the need to protect cabinet secrecy declined with the passage of time⁶³ and that criminal proceedings placed a particular burden on the courts to weigh the merits of claims related to cabinet secrecy.⁶⁴ Cases followed in the Court of Appeal and the House of Lords moved the courts from asserting a right to examine claims of privilege to actually examining documents for which privilege had been claimed.⁶⁵ Judges began also to question claims of privilege related to the hitherto sacrosanct example of documents entitled on their face to protection: cabinet minutes. In *Burmah Oil*, the House of Lords questioned that "the secrecy of the inner workings of the government machine" was so "vital a public interest that it must prevail over even the most imperative demands of justice." Even a cabinet minute should be protected only if disclosure would betray "some secret of high importance." Otherwise, "what is so important about secret government that it must be protected even at the expense of injustice in our courts?"⁶⁶

Canadian courts have continued to contribute to the development of the common law on cabinet secrecy as a result of cases arising from provincial jurisdiction. In 1982, the Supreme Court of Canada refused to sustain a claim of privilege for cabinet papers and testimony by a former provincial premier. Even cabinet documents enjoyed no absolute immunity, and the court unambiguously asserted that "it is the role of the courts, not the administration, to determine whether disclosure of documents would be injurious to

the public interest."⁶⁷ In 1986, the Supreme Court again rejected a claim of privilege, this time in relation to the papers of the Ontario cabinet. Justice Gérard La Forest agreed that cabinet deliberations deserved protection in principle but objected to "the absolute character of the protection accorded their deliberations or policy formulation without regard to subject matter, to whether they are contemporary or no longer of public interest, or to the importance of their revelation for the purpose of litigation."⁶⁸ Moreover, he expressed scepticism about arguments based on candour, attaching more weight to the content of documents.⁶⁹ On the larger questions of principle, La Forest, on the basis of a review of the jurisprudence since the *Conway* case, concluded, "In the end it is for the court and not the Crown to determine the issue."⁷⁰

The courts and others have remarked on the expansion of the matters to which the convention is said to apply

Canadian courts have also dealt with the various challenges concerning the constitutionality of the statute law, and they have done so cautiously for the most part. In 1982, before the adoption of the Charter, the Supreme Court upheld Section 41(2) of the Federal Court Act (in part predecessor to Section 39) as a valid exercise of the sovereignty of Parliament that was neither a threat to judicial independence, nor contrary to the equality before the law provisions of the Canadian Bill of Rights, nor unconstitutional because it somehow interfered with provincial responsibility for the administration of justice.⁷¹ This was a significant decision principally because it defined the limits of the arguments that might be advanced against the validity of the section. There was no room to argue that Parliament did not have the power to set aside the common law of Crown privilege – apart (post-1982) from Charter and other broad constitutional arguments, such as judicial independence, that left the possibility of arguing that Section 39 did not necessarily override other statutes. This was tested by the auditor general of Canada in the late 1980s in an attempt to force the government to provide him with information about the acquisition of a private company (Petrofina) by a Crown corporation (Petro-Canada), but ultimately the Supreme Court supported the use of Section 39.⁷²

Judgements of the Federal Court concerning the constitutionality of Section 39 were handed down in 1999 in an action arising from incidents at the 1997 APEX summit in Vancouver, in which the plaintiffs alleged improper governmental direction of the RCMP, which had been responsible for the security of the event involving numerous heads of government. In the course of proceedings, certificates were issued pursuant to Section 39. The

plaintiffs argued that Section 39 was beyond Parliament's power because it violated "fundamental, unwritten principles of the Canadian Constitution [that] ... include the independence of the judiciary, the rule of law and the separation of powers."⁷³ Both at trial and appeal, the plaintiffs lost on all points. Justice Barry Strayer for the Appeal Division supported his trial division colleague, Justice William McKeown, and elaborated on his decision. The decision forthrightly addresses the constitutionality of Parliament's action in removing the duty of the courts to weigh competing interests of the individual and the state, and it firmly rejects the erroneous application to responsible government of the doctrine of separation of powers.

Strayer reasoned that the Constitution is the supreme law of the land, that under the Constitution parliamentary supremacy had not been set aside by the Charter, and that therefore Parliament was entirely within its rights to legislate Section 39. "Both before and after 1982 our system was and is one of parliamentary sovereignty exercisable within the limits of the written constitution."⁷⁴ Given the supremacy of the Constitution and the central role of Parliament within the Constitution, it would be necessary to establish that in exercising its powers Parliament had "infringed a constitutional limit (express or implied) on its power."⁷⁵ As to whether the provisions of Section 39 were themselves beyond the power of Parliament, Strayer noted that the plaintiffs had been wrong to argue that Section 39 was unconstitutional because it was at variance with the common law. He considered it entirely within the power of Parliament "to define privileges of the federal Executive in the furtherance of the well-established and well-accepted principles of Cabinet secrecy. In the absence of some clear and compelling constitutional imperative to the contrary the legislation is valid and effective."⁷⁶ Strayer also dismissed the claims that Section 39 violated the "separation of powers," demonstrating plainly that such separation is not a characteristic of Westminster constitutions and that the reference in the preamble to a "constitution similar in Principle to that of the United Kingdom" recognized the importance of responsible government, "that is, a system where the Executive would be responsible to the legislature. The very concept was the antithesis of separation of powers."⁷⁷ He gave similar short shrift to the argument that Section 39, in circumscribing the right of judicial bodies to examine documents, undermined the independence of the judiciary, which he noted has been circumscribed by the Supreme Court to encompass such matters as the "security of tenure, the financial security, or the administrative independence of judges."⁷⁸

In another case, the Supreme Court in July 2002 concluded that "there is no basis upon which to find that s. 39 of the *Canada Evidence Act* is unconstitutional."⁷⁹ With seven of her colleagues concurring, Chief Justice McLachlin noted that a certificate taken by the clerk or a minister must be related to documents that are indeed confidences, must be made out as a "bona fide

exercise of delegated power," and must deal with information that has not already been disclosed. McLachin added that the clerk or minister must be satisfied that it "is information which the government should protect taking into account the competing interests in disclosure and in retaining confidentiality."⁸⁰ This duty to weigh, in her view, meant that "s. 39 has not substantially altered the role of the judiciary from their function under the common law regime," presumably because the judge must be satisfied that such a weighing of interests has occurred.⁸¹ This meant that "s. 39 does not offend the rule of law or the doctrines of separation of powers and the independence of the judiciary,"⁸² and this apparently makes it constitutional. Justice L'Heureux-Dubé dissented on the matter of a duty to weigh, taking the position that the clerk or minister is obliged only to determine that the document is a cabinet confidence and that "it is information that the government wishes to protect,"⁸³ but she did not use this to quarrel with the consequential conclusion about the constitutionality of Section 39.

The courts have not had to confront the question of whether Section 39 is somehow contrary to Charter – as distinct from broad constitutional – rights. Two other points stand out: first, the courts have upheld the authority of Parliament to adopt Section 39 and more generally to legislate in ways that do not reflect the state of the common law; second, the courts have not attempted to square the dichotomy between the duty of the courts to determine finally the balance between private and public interests at common law and the setting aside of that duty in respect of cabinet secrecy as a result of Parliament's action in enacting Section 39 of the Canada Evidence Act. As for the statutory provisions themselves, there has been an evident progression from common law *dicta* to Section 41(2) of the Federal Court Act with its undefined reference of "confidence of the Queen's Privy Council for Canada," to the provisions in Section 39 of the Canada Evidence Act and Section 69 of the Access to Information Act. As noted, these do not provide so much a definition of a "confidence" as a catalogue of papers where such may be found.

The courts and others have remarked on the expansion of the matters to which the convention is said to apply. In one case, the Federal Court commented on changes in the cabinet records system that appeared to result in information being withheld for purely technical reasons, since the information now appeared in one of the classes of documents set out in the statutory definition of a Privy Council confidence instead of elsewhere.⁸⁴ In another, before the British Columbia Court of Appeal, where the claim was made for documents several of which had already been disclosed inadvertently, one of the judges expressed concern that the certificate was being applied in certain instances to "papers that are used at some lower level to provide a foundation for Cabinet papers" instead of just to those "actually put before the Cabinet."⁸⁵ The information commissioner, who has challenged the govern-

ment in the courts on the scope of its claims, has suggested extensive reforms to the Access to Information Act that would narrow the scope of cabinet secrecy and bring such claims under his review authority.⁸⁶ In particular, he favours a somewhat more substantive definition that would, while including a list of "generic types of records" similar to that now in the act, include reference to "records which would reveal the substance of deliberations of Cabinet or one of its committees."⁸⁷ The commissioner has declared that "numerous instances have arisen where the government has certified information to be a Cabinet confidence when the information clearly does not qualify."⁸⁸

A recent report on revisions to the federal access-to-information regime has – like earlier reports of the federal information commissioner – recommended measures to narrow the scope of the application of the statute that deals with the non-disclosure of cabinet secrets.⁸⁹ Although these reports share the laudable objective of supplementing if not replacing the shopping list of classes of documents with a substantive definition of a cabinet secret, they do not appear to grasp clearly that what needs and merits protection are the political secrets of the cabinet. As with the courts, such reports and reviews do not come to grips with the central question about the legitimacy of cabinet secrecy: how is it possible to permit a secret of government to override the rights of an individual, particularly in the context of a criminal proceeding where the consequences of a wrongful conviction have far-reaching consequences?

The answer lies in an appreciation of the nature of the cabinet process: its informal and political character. Its decisions are of course highly "efficient," but they are not the legal basis for executive action. The latter is to be found in an array of instruments that are not – or should not be – cabinet secrets.⁹⁰ These include orders-in-council, documents issued under the authority of the governor general (and, rarely, the Queen), and ministerial orders and directives pursuant to statute. To be sure, few practitioners would be able to articulate this distinction between the informal cabinet and the formal executive. Moreover, although constitutional authorities draw the distinction between the political character of the cabinet and the formal executive functions of the Crown or those who act in the name of the Crown, they do not examine the implications of this distinction, one of which is that the informal nature of the cabinet is central to justifying the secrecy of its proceedings.

The courts have not addressed the distinction and have instead conducted a discourse on whether cabinet secrets – as the deliberations of the executive – ought to be protected from disclosure even at the cost of injustice. The idea that somehow cabinet's business ought to be justiciable presents far from trivial threats to the secrecy convention. Learned commentators have recognized the inherent problems of such an approach,⁹¹ something that to date has not engaged the attention of the Supreme Court of Canada. And yet, it is

the informal and political character of the cabinet that justifies the practice of secrecy and keeps the cabinet out of the courts. The distinction between the political and the formal executive is critical because, in an era of "open government" and the Charter, secrecy is unlikely to outweigh competing claims for information necessary to the proper administration of justice. Judges have not considered whether there is a distinction between the cabinet and the formal executive.⁹² And to date the Supreme Court has not forthrightly addressed the problem of the executive exercising the judicial duty to determine where justice lies in matters involving the federal cabinet.

Canada's version of Westminster democracy is being eroded by lack of appreciation – and, hence, respect – for the conventions of responsible government and the important principles of constitutional government they underpin

Although the distinction between the cabinet and the formal executive (governor-in-council and ministers) is central, it is far from adequate as the sole basis for protecting cabinet secrecy. It is perhaps the foundation stone, but cabinet practice – maintaining severable records and the availability of other means of establishing the facts (public documents such as orders-in-council) – is essential if cabinet secrecy is to survive in the face of growing scepticism. Cabinet decisions are formally given effect by ministers individually or by the governor-in-council or the governor general on the advice of ministers, and proof of such action is publicly available through ministerial orders and orders and minutes of the committee of the privy council. Litigants seeking to access "confidences of the privy council" are generally trying to establish whether the government made a decision that in some way affected their interests. They need access to formal decisions, and these are generally available (in a typical year, roughly 2,500 orders and minutes of council are gazetted).⁹³ Unfortunately, not many litigants have a clear appreciation of the distinction between the informal political functions of the cabinet and the actions of the formal executive. Some litigants believe factual material in cabinet documents will establish proof of their contentions, and those who are simply curious seek access to the factual material considered by the cabinet in making its decisions. And, of course, cabinet memoranda (and many reports and decisions) contain large numbers of facts and few expressions of the views and opinions of ministers. (This has been recognized since the mid-1980s by the arrangements made to provide the auditor general with access to the "analysis" portions of cabinet memoranda.⁹⁴) In considering the rights of individuals before the courts, the political process

of the cabinet is not likely to be relevant in the preponderance of litigation: "It is important to realize that what is being sought from the government is *facts*. A litigant requires facts in order to proceed at trial. Facts are the heart of the legal system and without them a trial would be a mockery. ... The administration of justice needs facts."⁹⁵

Cabinet practice is, therefore, central to maintaining the secrecy convention, and this includes ensuring the centrality of its political functions in reconciling the views and opinions of responsible ministers. A paper system is needed that segregates fact from process and opinion. A definition that ties cabinet secrecy to the views and opinions of ministers – or the maintenance of the collective responsibility of ministers – would protect the essence of the secrecy convention while removing the absolute barrier to the production of factual material contained within the cabinet papers system. Such a substantive definition, dropping the current "shopping list" of records that may or may not contain cabinet secrets and that may evolve or disappear over time, would provide protection at least in principle for the views and opinions of ministers wherever found and in whatever form.

There is no doubt that the law in Canada has moved far beyond the protection of the political secrets of the cabinet as a political deliberative body. When the law seeks to codify and classify, it can produce bizarre results: thus, under the law, a technical paper annexed to a minister's cabinet memorandum may be considered a cabinet secret and thus immune from production; whereas a memorandum recording the cabinet secretary's instructions from the prime minister concerning a dispute between ministers may not be immune. Can anyone doubt which paper if disclosed would bring joy to the hearts of the government's opposition in the House of Commons? The provisions of Section 39 of the Canada Evidence Act and Section 69 of the Access to Information Act prevent the disclosure of facts, as well as protecting the decision-making process. Preventing the disclosure of facts does not conform to the purpose of the cabinet secrecy convention. Moreover, the breadth of these statutory provisions is undermining the legitimacy of the convention.

The courts in Canada have held the application of cabinet secrecy through statute law to be legitimate. The current law is, however, badly framed because it has strayed far from the central purpose of the cabinet secrecy convention to protect the views and opinions of ministers from exploitation by their political opponents. The convention needs to be reasserted in the statute law.

More fundamentally, however, measures are required to reinforce the legitimacy of cabinet secrecy before the court of public opinion. As Donald Savoie has argued, there is doubt that the cabinet continues to fulfil its central role of uniting ministers in order that they may be collectively responsible for government.⁹⁶ If indeed cabinet is no more than a sounding board, a

pep-talk session for the senior members of the caucus, one is bound to ask whether it still merits absolute immunity from the disclosure of its proceedings, still less factual material laid before it. The legitimacy of cabinet secrecy depends foremost on the most fundamental of building blocks of the Westminster constitution: that the executive is collective, made up of ministers exercising their individual responsibilities in a concerted way that maintains the support of the House of Commons.

There is no doubt that the cabinet of today is greatly changed from that of Lord Salisbury or Mackenzie King or even Lester Pearson. But is it sufficiently the same in its essence to justify the retention of cabinet secrecy? If it is, then greater discretion needs to be exercised in claiming immunity from the disclosure of its proceedings. If it is not, then the problem goes beyond the protection of the secrecy convention to the fundamentals of responsible government.

The problems of the constitution presented at the beginning of this article remain. There is slight appreciation of the cabinet as the informal, political executive, and this extends even to the highest levels of the judiciary. To a degree this is understandable, given the problems associated with the development of the cabinet as the key element in the administrative coordination of the government. This strand of the Gordian knot is itself entwined in the cabinet papers, which contain relatively few views and opinions of ministers but which are treated under statute in Canada as if they did. And the certificates claiming immunity for cabinet and cabinet-related papers run counter to the rules of justice that traditionally have made the courts the arbiter between the individual and the state.

Unravelling this knot may well require some amendments on the lines proposed by others and on the lines of statutory provisions used in the United Kingdom and Australia. Canada would do well to heed Bryce's advice in 1957, when he asked St. Laurent and Diefenbaker to agree to protect cabinet papers that reveal "differences of view between Ministers or opinions of Ministers which would not be put on paper if it were felt they would ultimately fall into the hands of members of another political party."⁹⁷

Canada's version of Westminster democracy is being eroded by lack of appreciation – and, hence, respect – for the conventions of responsible government and the important principles of constitutional government they underpin. The political and informal character of the cabinet lies at the heart of the conventions of the constitution. The cabinet secrecy convention is the foundation for the maintenance of collective cabinet responsibility, but if cabinet secrecy is to remain part of our constitutional arrangements, it is essential that the cabinet remain the mainspring of government. Vigilance is required to ensure that the cabinet fulfils its political functions of making responsible government work, for which purposes the protection of its political secrets is not only justified but also essential to parliamentary democracy.

Notes

- 1 "The idea that Cabinet proceedings are basically secret has nothing new about it." United Kingdom, Committee of Privy Counsellors on Ministerial Memoirs, *Report*, Cmnd. 6386, January 1976 (London: HMSO, 1976), p. 13.
- 2 See Ontario, "A real, positive change in how government works," *Press Release from the Office of Premier-designate Dalton McGuinty*, 22 October 2003 (Toronto: Queen's Printer, 2003).
- 3 "I, XYZ, do solemnly and sincerely swear (declare) that I shall be a true and faithful servant to Her Majesty Queen Elizabeth II, as a member of Her Majesty's Privy Council for Canada. I will in all things to be treated, debated and resolved in Privy Council, faithfully, honestly and truly declare my mind and my opinion. I shall keep secret all matters committed and revealed to me in this capacity, or that shall be secretly treated of in Council. Generally, in all things I shall do as a faithful and true servant ought to do for Her Majesty." P.C. 1999-1441, 3 August 1999.
- 4 Walter Bagehot, *The English Constitution* (London: Oxford University Press, [1867] 1958), p. 4.
- 5 *Ibid.*, pp. 12-13.
- 6 It was not until 1992 that the British acknowledged the existence and membership of the standing committees of the cabinet. See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 7th edition (London: Penguin, 1994), p. 188. In Canada, the practice of disclosing the subject-matter and membership of standing committees was first introduced in 1979. Hitherto such matters were considered "internal to the cabinet." One practical reason for secrecy was to reduce the lobbying by interest groups to get "their" minister appointed to a particular committee.
- 7 Bagehot's "efficient" cabinet was contrasted with the dignified Crown: "The dignified parts of government are those which bring it force - which attracts its motive power. The efficient parts only employ that power." Bagehot, *The English Constitution*, p. 4.
- 8 See Sir William Anson, *The Law and Custom of the Constitution*, Vol. II (Oxford: Clarendon Press, 1922), p. 156; Sir Ivor Jennings, *Cabinet Government* (Cambridge: Cambridge University Press, [1959] 1965), pp. 2-3; J.R. Mallory, *The Structure of Canadian Government* (Toronto: Macmillan, 1971), p. 62; R. MacGregor Dawson and Norman Ward, *The Government of Canada* (Toronto: University of Toronto Press, [1947] 1970), pp. 171-72; Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Don Mills, Ont.: Oxford University Press Canada, 1991), pp. 65-8. (A statement by Lord Hunt's can be found in the text at superscript 18, and a statement by Lord Armstrong can be found in note 18.) Canada, Privy Council Office, *Responsibility in the Constitution* (Ottawa: Supply and Services Canada, [1977] 1993), p. 45.
- 9 Anson, *The Law and Custom of the Constitution*, p. 156.
- 10 Jennings, *Cabinet Government*, pp. 2-3.
- 11 Dawson and Ward, *The Government of Canada*, pp. 171-72.
- 12 Bryce to St. Laurent, 14 June 1957. Exhibit H to Affidavit by Ward Elcock, 24 November 1989, In the Federal Court of Appeal, In the Matter of an Appeal from the Trial Division etc., in *Attorney General of Canada v. Central Cartage Company et al.*, Court File No. A-952-88 (T-9047-82).
- 13 The distinction was captured in an order-in-council that dealt with the cabinet papers of the Liberal government passed following the Conservatives victory in 1979. See P.C. 1979-1616, 2 June 1979.
- 14 Referring to the nineteenth-century British cabinet, at a time when there was no secretariat, Jennings reported, "The taking of notes by any minister other than the prime minister was long forbidden. Sir William Molesworth took notes in the Cabinet of Lord Aberdeen, and on one occasion Lord Granville refused to continue a statement until Molesworth laid down his note-book. Lord Derby took notes in Lord Beaconsfield's Government, asserting that he saw

- no objection to temporary notes that were subsequently destroyed. Both Lord Salisbury and Mr. Asquith forbade the taking of notes. The result was that normally there was no record of Cabinet decisions except the prime minister's letter to the sovereign." Jennings, *Cabinet Government*, pp. 269–70. For a recent Canadian exception to the prime minister's usual rule, see Geoffrey Stevens, *The Player: The Life and Times of Dalton Camp* (Toronto: Key Porter Books, 2003), p. 292.
- 15 United Kingdom, Cabinet Office, *Questions of Procedure for Ministers* (London: HMSO, 1992), cited in Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (London: Victor Gollancz, 1995), p. 102. These exact words survived intact in the "Ministerial Code," published for the first time by the Blair administration in 1997, and were reflective of the original advice provided to ministers by Clement Atlee in 1949. See Amy Baker, *Prime Ministers and the Rule Book* (London: Politico's, 2000), pp. 157, 141.
 - 16 Canada, Privy Council Office, *A Guide for Ministers and Secretaries of State* (Ottawa: Public Works and Government Services Canada, 2002), p. 36. This document was published under the authority of Prime Minister Jean Chrétien on 11 June 2002. Beginning in 1974, earlier versions of this document, entitled *Guidance for Ministers*, were provided to ministers on a confidential basis by the Privy Council Office on the instructions of the prime minister.
 - 17 *Attorney-General v. Jonathan Cape Ltd. and Others; Attorney-General v. Times Newspapers Ltd.*, [1975] 3 All England Law Reports Annotated 484 (Court of Queen's Bench). Like Hunt's, Armstrong's defence of the secrecy convention occurred in the context of litigation: "In my opinion it is necessary in the national interest for the proper functioning of government in this country that documents ... relating to the formulation of issues of government policy at the highest level, namely Cabinet committees and Cabinet, should be withheld from production. The importance of confidentiality for the inner workings of government at this level has been widely recognised and I respectfully refer to the observations of Lord Reid in *Conway v. Rimmer*, [1968] 1 All ER 874 at 888, [1968] AC 910 at 952. Since that judgement the confidentiality of cabinet proceedings had been considered by two independent committees, the Franks Committee on section 2 of the Official Secrets Act 1911 (1972) (Cmnd. 5104) and the Radcliffe Committee on ministerial memoirs (1976) (Cmnd. 6386). Both reaffirmed without qualification the importance of preserving the confidentiality of the proceedings in Cabinet and Cabinet committees." See *Air Canada and Others v. Secretary of State for Trade and Another*, [1983] 1 All England Law Reports Annotated 161 at 177–78 (Court of Appeal).
 - 18 See de Smith and Brazier, *Constitutional and Administrative Law*, p. 190.
 - 19 For a generic example of such a mandate letter, see Peter E. Larson, ed., *Changing the Guard: Effective Management of Transitions in Government* (Ottawa: Public Policy Forum, 2001), pp. 46–7.
 - 20 United Kingdom, Committee of Privy Counsellors on Ministerial Memoirs, *Report*, pp. 10, 13. In Canada, it used to be customary to seek the permission of the governor general for an outgoing minister to be released from the privy councillor's oath for the purpose of such explanation, but this appears to have died out – as has the practice of ministers resigning for reasons of principle. As in the United Kingdom, there are rules for the vetting of ministerial memoirs by the Privy Council Office, but since few of these are published the rules appear to operate somewhat haphazardly. See Canada, Privy Council Office, *A Guide for Ministers and Secretaries of State*, p. 44.
 - 21 Lord Hunt of Tanworth, "Access to a previous government's papers," *Public Law* (1982), pp. 517–18.
 - 22 See Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, [1984] 1986), pp. 74–5; Heard, *Canadian Constitutional Conventions*, p. 65. The convention is also briefly described by the Privy Council Office in *A Guide for Ministers and Secretaries of State*, p. 25.
 - 23 Jennings, *Cabinet Government*, p. 274.

- 24 *Air Canada v. Secretary of State for Trade*, at 177.
- 25 Bryce to St. Laurent, 14 June 1957.
- 26 "There are also classes of documents and information which for years have been recognised by the law as entitled in the public interest to be immune from disclosure. In such cases the affidavit or certificate of a Minister is hardly necessary. I refer to such documents as Cabinet minutes." *Rogers v. Secretary of State for the Home Department; Gaming Board for Great Britain v. Rogers*, [1972] 2 All England Law Reports Annotated 1070-71 (House of Lords).
- 27 This was recognized by the Haldane report issued in 1918, two years after the establishment of the British cabinet secretariat. See United Kingdom, Ministry of Reconstruction, Machinery of Government Committee, *Report*, Cd. 9230 (London: HMSO, 1918), pp. 4-5.
- 28 For the numbers of documents, see affidavit of Nicholas d'Ombain, *Oberlander and Attorney General of Canada*, Federal Court of Canada, Trial Division, Court File T-1505-01, 2002.
- 29 Canada, Privy Council Office, *Responsibility in the Constitution*, pp. 41-2.
- 30 See *The Rajah of Coorg v. The East India Company* (1855-1856), 25 The Law Reports 350 (Courts of Chancery).
- 31 Peter Hogg, *Constitutional Law of Canada*, 3rd edition (Toronto: Carswell, 1992), pp. 264-65.
- 32 An early case provided a description of the matters covered: "state papers, despatches, minutes or documents or any such description which relate to the carrying on of the government, and are concerned with the transactions of public affairs." *Hennessy v. Wright* (1888), 21 The Law Reports 509 at 510 (Court of Queen's Bench).
- 33 *Ibid.*, at 515. By the 1930s, the common law began to assert the right of the court to determine the relevance of privileged information and the extent of damage that might result from disclosure. See *Robinson v. State of South Australia* (No. 2), [1931] A.C. 719.
- 34 *Duncan v. Cammell Laird & Co. Ltd.*, [1942] 1 All England Law Reports Annotated 590 (House of Lords).
- 35 *Ibid.*, at 595.
- 36 *In the Matter of a Reference Under the Constitutional Questions Determination Act*, R.S.B.C. 1948, c. 66 and in *the Matter of Regina v. Snider*, [1953-1954] 4 D.L.R. 486 (Supreme Court of Canada).
- 37 Denning's fame rests on his tenure as master of the rolls (judicial head of the Court of Appeal) from 1962 to 1982. First appointed to that court in 1948, he was promoted law lord in 1957, but in 1962 he opted to return to the lower court on account of difficulties with his senior judicial colleague in the House of Lords, Lord Simonds. He had an engagingly simple, direct style of prose.
- 38 *Re Grosvenor Hotel*, [1964] 3 All England Law Reports Annotated 354 at 361-62.
- 39 *Gagnon v. Québec Securities Commission*, [1964] 50 D.L.R. (2d) 334 (Supreme Court of Canada).
- 40 *Conway v. Rimmer*, at 952.
- 41 The reason for the new term was set out by the House of Lords in 1972 by Lord Salmon in describing the scope of Crown privilege: "[T]he Crown ... may intervene to prevent production or disclosure of that which in the public interest ought to be protected. Such an intervention goes under the misleading name of Crown privilege. When a document or information of the kind to which I have referred is in the possession of a government department it is the duty rather than the privilege of the Minister to refuse its disclosure. When such a document is in the possession of a third party, again it is the duty rather than the privilege of the executive through the Attorney-General to intervene in the public interest to prevent its disclosure." *Rogers v. Secretary of State for the Home Department; Gaming Board for Great Britain v. Rogers*, at 1070.
- 42 Federal Court Act, R.S.C. 1970, 2nd Supplement, c. 10. It should be noted that apart from Quebec, the provinces in Canada do not have similar statutes; they are therefore subject to the common law rules of evidence. Quebec's statutory provision is contained in Article 308 of the Code of Civil Procedure. See Hogg, *Constitutional Law of Canada*, p. 264, note 26.

- 43 Canada, Parliament, House of Commons, *Debates and Proceedings (Hansard)*, 28th Parliament, 3rd Session, 29 October 1970 (Ottawa: Queen's Printer, 1970), p. 698.
- 44 *Ibid.*
- 45 Federal Court Act.
- 46 Canada, Secretary of State, Hon. John Roberts, *Legislation on Public Access to Government Documents* (Ottawa: Supply and Services Canada, 1977), p. 4.
- 47 Order-in-Council, P.C. 1977-1911, 6 July 1977.
- 48 Prior to the McDonald Commission, no federal public inquiry had been given access to cabinet papers. In the United Kingdom in the early 1980s, the inquiry into the Falklands war had access to cabinet-level information, as did the Scott Inquiry in the early 1990s into the sale of arms to Iraq. Provincially in Canada, the recent Walkerton Inquiry in Ontario, headed by Justice Dennis O'Connor, asserted that its mandate "constituted a waiver of Cabinet privilege by the province," which had the effect of gaining the commission access to whatever documents it wanted subject to procedures for putting them into evidence. Nevertheless, documentary and oral information about the cabinet's business remain rare exceptions to the general rule of non-disclosure. See Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (MacDonald Commission), *Report* (Ottawa: Queen's Printer, 1978); United Kingdom, Committee of Privy Councillors, *Falkland Islands Review*, Cmnd. 8787 (London: HMSO, 1983); United Kingdom, Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions (Scott Inquiry), *Report. The Rt. Hon Sir Richard Scott, the Vice Chancellor, Ordered by the House of Commons to be Printed, 15 February 1996* (London: HMSO, 1996); Ontario, Walkerton Commission of Inquiry, *Report: Part One: The Events of May 2000 and Related Issues* (Toronto: Queen's Printer, 2002), pp. 486-87.
- 49 The text is reproduced in "Reasons for Decision of the Commission, October 13, 1978," in Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (MacDonald Commission), *Second Report*, Vol. 2, p. 1176.
- 50 Starting in 1984, when John Turner took over from Trudeau, the convention was extended to cover the documents of successive administrations of the same political party. This was a stretch from Bryce's wording based on British practice concerning the protection of one party's cabinet secrets from an opposing party.
- 51 Principally, these were cabinet memoranda, agendas, records of deliberations and decisions, discussion papers, and communications between ministers and briefing papers for ministers related to government policy or decisions. See Section 69(1) of An Act to enact the Access to Information Act and Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof, 29-30-31 Eliz. II, c. 111.
- 52 Canada Evidence Act, R.S. 1985, c. C-5, ss. 37, 38
- 53 Ombudsman Act 1976, Commonwealth Consolidated Acts [Australia], Act No. 181
- 54 Administrative Decisions (Judicial Review) Act 1977, Commonwealth Consolidated Acts [Australia], Act No. 59, s. 14
- 55 *Ibid.*
- 56 Administrative Appeals Tribunal Act 1975, Commonwealth Consolidated Acts [Australia], Act No. 91, s. 36
- 57 *Ibid.*
- 58 Freedom of Information Act 1982, Commonwealth Consolidated Acts [Australia], Act No. 3, s. 34
- 59 Auditor-General Act 1997, Commonwealth Consolidated Acts [Australia], Act No. 151, s. 37
- 60 Australian Law Reform Commission, Administrative Review Council, *Open Government: Review of the Commonwealth's Freedom of Information Act 1982, 1995. Report No. 4 (ALRC77)* (Canberra: Australian Government Publishing Service, 1995), Chapter 9, para. 9.7.

- 61 Parliamentary Commissioner Act 1967, Public General Acts [U.K.], Part I 1967, c. 13. See de Smith and Brazier, *Constitutional and Administrative Law*, p. 699.
- 62 Freedom of Information Act 2000, Public General Acts [U.K.], Part III 2000, c. 36, s. 36. The act also contains the interesting provision that the "duty to confirm or deny does not arise in relation to [such] information."
- 63 *Attorney-General v. Jonathan Cape Ltd. and Others; Attorney-General v. Times Newspapers Ltd.*
- 64 *Sankey v. Whitlam and others*, [1978] 21 Australia Law Reports 505 (High Court).
- 65 See *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England*, [1979] 2 All England Law Reports Annotated 461 (Court of Appeal); *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England*, [1979] 3 All England Law Reports Annotated 700 (House of Lords).
- 66 *Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England*, House of Lords, [1979] 3 All ER 700.
- 67 *The Honourable Joseph Roberts Smallwood v. F.H. Sparling et al.*, [1982] 2 S.C.R. 686 at 704 (Supreme Court of Canada).
- 68 *H. Rod Carey v. Her Majesty the Queen in Right of Ontario, the Ontario Development Corporation, the Northern Ontario Development Corporation, Claude Bennett and Allan Grossman* 1985-1986, [1986] 2 S.C.R. 637 at 659 (Supreme Court of Canada).
- 69 *Ibid.*, at 658, 671.
- 70 *Ibid.*, at 654.
- 71 *Commission des droits de la personne v. Attorney General of Canada et al.*, [1982] 1 S.C.R. 215; (1982), 134 D.L.R. (3rd) 17; 41 N.R. 318, at 222, 224, 229.
- 72 *The Auditor General of Canada v. The Minister of Energy, Mines and Resources, the Minister of Finance, the Deputy Minister of Energy, Mines and Resources and the Deputy Minister of Finance*, [1989] 2 S.C.R. 49; (1989), 61 D.L.R. (4th) 604; 97 N.R. 241. In 1989, the Appeal Division of the Federal Court upheld the finality of a Section 39 certificate and stated that "Crown privilege for Cabinet documents was an established exception to the right to state one's case. There was no denial of due process under section 2(e) of the Bill of Rights." *Canada (Attorney General) v. Central Cartage Co.*, [1990] F.C.A., 109 N.R. 373 at 1.
- 73 *Singh v. Canada (Attorney General)*, [2000] F.C.J. No. 4 (Q.L.) (F.C.A.), para. 10.
- 74 *Ibid.*, para. 16.
- 75 *Ibid.*
- 76 *Ibid.*, para. 23.
- 77 *Ibid.*, para. 28.
- 78 *Ibid.*, paras. 38-39.
- 79 *Babcock v. Canada (Attorney General)*, [2002] SCC 57, File No. 28091, para. 61 (Supreme Court of Canada).
- 80 *Ibid.*, para. 22.
- 81 *Ibid.*, paras. 19, 60.
- 82 *Ibid.*, para. 57. Apparently, the chief justice did not absorb Strayer's scholarship on the matter of the separation of powers not being a fundamental of the Constitution.
- 83 *Ibid.*, para. 61.
- 84 *The Information Commissioner v. The Minister of the Environment and Ethyl Canada Ltd.*, [2001] FCT 277, paras. 41-49.
- 85 *Babcock et al. v. The Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada and in his capacity as Minister of Justice, the Treasury Board of Canada and the Deputy Minister of Justice*, Supreme Court of British Columbia, Vancouver Registry, Docket No. C963180 [1999], para. 48.
- 86 Canada, Office of the Information Commissioner, *Annual Report, 2000-2001* (Ottawa: Public Works and Government Services Canada, 2001), p. 43ff.
- 87 *Ibid.*, p. 49.
- 88 *Ibid.*, p. 45. For another critical view of the statute law, see Alan W. Mewett, "State secrets in Canada," *The Canadian Bar Review* 63 (1985), p. 376.

- 89 Canada, Access to Information Task Force, *Access to Information: Making it Work for Canadians. Report* (Ottawa: Public Works and Government Services Canada, 2002), pp. 44–7.
- 90 The exceptions are certain Treasury Board documents, including minutes and decisions that are not generally available and yet provide evidence of formal executive actions. The Treasury Board paper system should be overhauled to correct this.
- 91 For an excellent survey (and insight into what could happen if the cabinet's work were held to be justiciable), see M.C. Harris, "The courts and the cabinet: Unfastening the buckle," *Public Law* (1989), pp. 251–96.
- 92 In a 1985 decision, *Operation Dismantle*, the Supreme Court indicated that "Cabinet decisions are reviewable by the Courts under s. 32(1)(a) of the *Charter* and the executive branch of the Canadian government bears a general duty to act in accordance with the dictates of the *Charter*." In addition, the court equated the cabinet with the executive. Although this was an assumption rather than an argument, nevertheless in equating the cabinet with the formal executive (i.e., ministers individually and the governor-in-council), the court has set out an erroneous doctrine that has the potential to undermine the protection afforded to cabinet confidentiality on the ground the cabinet is informal and political rather than formal and executive. See *Operation Dismantle v. Her Majesty the Queen*, [1985] S.C.R. 5. Section 32(1)(a) applies the *Charter* to Parliament and the legislatures and their respective governments as well as to all matters within their authority.
- 93 For the numbers, see Nicholas d'Ombrain, *Oberlander and Attorney General of Canada*, Federal Court of Canada, Trial Division, Court File T-1505-01, 2002.
- 94 For a description, see *The Information Commissioner v. The Minister of the Environment and Ethyl Canada Ltd.*, [2001] FCT 277, paras. 40–43.
- 95 S.I. Bushnell, "Crown privilege," *Canadian Bar Review* 51 (1973), pp. 581–82 (emphasis in the original).
- 96 Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999), esp. pp. 7, 339.
- 97 Bryce to St. Laurent, 14 June 1957.

THE STRUCTURE
OF
CANADIAN
GOVERNMENT

J. R. Mallory

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THE STRUCTURE OF THE CABINET

The Cabinet is, above all, a committee to negotiate.³⁸ That is to say, its primary purpose is to reach agreement on what the policy of the government is to be. It is the policy-making organ of government. While it is true that Parliament gives legal effect to policy by legislating, it is the Cabinet which decides what Parliament is to legislate about. The second function of the Cabinet is to co-ordinate the separate departments into which the executive has been divided. The third function is to supervise the administration of policy which has been laid down by the legislature.³⁹

These three functions require, for optimum efficiency, different kinds of Cabinets. For decision-making, the smaller the Cabinet the better.⁴⁰ But for co-ordination the Cabinet should be large so that every aspect of administration is represented in it. It is sometimes argued that a minister in charge of a department should be above all a first-class administrator. But a minister must be many things. It is equally important that he be a good committee man and a good parliamentarian. It has also been argued with force that the common sense of the layman is a necessary balance to the specialized view of the expert. "The truth is," said Walter Bagehot, "that a skilled bureaucracy is, though it boasts an appearance of science, quite inconsistent with the true principles of the art of business. . . . One of the most sure principles is that success depends on a due mixture of special and non-special minds – of minds which attend to the means and of minds which attend to the end."⁴¹

SIZE OF THE CABINET

Impatient reformers often chafe at the size and composition of the Cabinet, forgetting that both of these matters are to a large extent settled by the necessity of political negotiation and the realities of power. As Sir John A. Macdonald said, "the great object of securing a full Cabinet, was that each Province of the Dominion might be fully represented."⁴² If the necessities of balanced representation require a

38. K. C. Wheare, *Government by Committee* (London, 1955), *passim*.

39. See *Report of the Machinery of Government Committee*, Cd. 9230 (London, 1919).

40. "The Cabinet should be small in number – preferably ten, or, at most, twelve." *Ibid.*, p. 5.

41. Bagehot, *The English Constitution*, p. 174.

42. P.A.C., *Canadian Parliamentary Debates, 1866-1870*, April 3, 1868.

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Constitutional Law of Canada

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Part I. Basic Concepts

Chapter 9. Responsible Government

II. The Executive Branch

§ 9:7. Ministerial responsibility

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Legal Topics

There is a minister at the head of each of the departments of government. Most of the cabinet ministers have charge of at least one department. There are often one or more “ministers without portfolio” who are members of the cabinet, but who do not have charge of a department. Each minister who does have charge of a department has the administrative duties that go with such an office. In addition, the minister “represents” his or her department in Parliament: the minister pilots the departmental estimates of proposed expenditures through the House, explains and defends the policies and practices of the department, and introduces into Parliament any bills that relate to the work of the department.¹

A government department is, of course, administered by civil servants,

who, in contrast to the minister, are supposed to be politically neutral. The senior civil servant in each department, who in Canada is usually called a “deputy minister”, is the link between the minister and the civil servants. The deputy minister acts both as an adviser to the minister and as the senior manager of the department. Of course, the minister is under no obligation to follow the advice of the deputy minister. The deputy minister is within the tradition of civil service neutrality: when the government changes, the deputy minister, like other career civil servants, will usually retain his or her position. However, the deputy minister is not appointed by normal civil service procedures: the appointment is made by order in council on the recommendation of the Prime Minister. The appointment is normally made from within the ranks of the career civil service, and is not treated as political patronage. Nevertheless, it is not unusual for a deputy minister to be replaced when a new government takes office.

One aspect of the political neutrality of civil servants is the convention that they are anonymous in the sense that they should not be criticized personally or otherwise held accountable in Parliament. All the acts of the department are done in the name of the minister, and it is the minister who is responsible to Parliament for those acts. In this context, the word “responsible” is often said to entail two consequences. First, the minister is supposed to explain to Parliament, when asked, the actions of his or her department. This is a real responsibility. During the regular question period, a minister will be frequently called upon by other members of Parliament to answer questions about the work of the department.² Secondly, the minister is supposed to resign if a serious case of maladministration occurs within the department. This second aspect of ministerial responsibility is often asserted to exist, but is of much more doubtful strength. In a case of misconduct or serious maladministration by a minister personally, the principle would certainly apply and would require the resignation of the minister. In a case of misconduct or maladministration by a civil servant in the

minister's department, a ministerial resignation is quite unlikely to follow in Canada. Accordingly, it may be more realistic (and therefore accurate) to define ministerial responsibility as not including an obligation to resign for merely departmental sins, although such resignations are often called for by the opposition and do occasionally occur.³

The notion of the responsibility of individual ministers is related to, but distinct from, the notion of the “collective responsibility” of the cabinet as a whole. All cabinet ministers collectively accept responsibility for cabinet decisions. This means that a cabinet minister is obliged to give public support to any decision reached by the cabinet, even if the minister personally opposed the decision within the cabinet and still disagrees with it. If the minister does decide to express dissent in public, then the minister should resign; and, if the minister does not resign, he or she can expect to be dismissed by the Prime Minister (although the Prime Minister might decide to tolerate the offence). Even after a minister resigns or is dismissed, the obligations of confidentiality and unanimity continue, but the Prime Minister will normally give permission to the minister to publish his or her reasons for resignation.

Collective responsibility implies more than cabinet solidarity. Its most fundamental consequence is that if a cabinet decision is attacked in Parliament the issue is one of confidence in the government. As will be explained later in this chapter, if a government is defeated in the House of Commons⁴ on an issue of confidence in the government, then the government must either resign or advise the Governor General to dissolve the House for an election. Consequently, the government will insist that its supporters in the House vote on party lines in favour of the government. Since the government is in office because it commands a majority of the members of the House, it is normally in a position to resist any opposition attack on its policies. The vigour of the doctrine of collective responsibility is what undermines the doctrine of individual

responsibility. If a ministerial decision has been approved or ratified by the cabinet, then the individual minister will be protected by collective responsibility. More bluntly, one must acknowledge that if the government does not want a minister to resign, then no matter how clearly the facts would seem to warrant the minister's resignation, there is no way that the opposition can force it to happen.

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Footnotes

- 1 In addition to one or more departments, a minister will often have a number of Crown corporations and regulatory agencies assigned to his or her ministry. These bodies are outside the departmental structure because they are intended to operate with more autonomy than a government department. However, because they are publicly funded, they have to be subjected to some degree of ministerial control; the mechanisms of that control differ greatly from one body to another.
- 2 Contrast the United States, where the President and his ministers are not members of Congress and do not have to answer questions posed by members of Congress.
- 3 There is no personal *legal* responsibility on the part of a minister for torts or crimes committed by civil servants within a minister's department. In tort, vicarious liability for the acts of civil servants attaches to the Crown, which is the employer, not to individual ministers: [Bainbridge v. Postmaster-General, \[1906\] 1 K.B. 178 \(C.A.\)](#) (minister not liable for torts committed by subordinates). In criminal law, there is no general doctrine of vicarious liability: [Bhatnager v. Can., \[1990\] 2 S.C.R. 217](#) (ministers not liable for contempt of court order of which they were unaware).

4

The responsibility of the government and of individual ministers is to the elective lower house, and not to the Senate. A defeat in the Senate does not entail resignation or dissolution. This is one reason why only a few cabinet members are drawn from the Senate. Another reason is that a minister who sits in the Senate is not available to answer questions during question period in the House of Commons.

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